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Supreme Court of the United States

OCTOBER TERM, 1928.

No. 166

STATE OF ALABAMA AND ALABAMA PUBLIC SERVICE COMMISSION, *Appellants*,

vs.

UNITED STATES, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

BRIEF FOR ALABAMA CARRIERS, APPELLEES

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT OF THE CASE.

This is an appeal, under the Act of October 22, 1913, (38 Stat. 219), from an order of the District Court of the Northern District of Alabama, Southern Division, (Walker and Foster, Circuit Judges, and Grubb, District Judge), entered on February 14, 1928, dismissing a bill brought by the State of Alabama and the Alabama Public Service Commission to enjoin and set aside certain orders of the Interstate Commerce Com-

mission, hereinafter called the Commission, in so far as said orders affected the intrastate rates on fertilizers and fertilizer materials and articles taking the same rates, in carloads, in Alabama. (R. 236.)

On July 30, 1924, a petition was filed with the Commission on behalf of all railroads operating in Alabama, wherein it was alleged that the Alabama Public Service Commission had, by order, required the railroads to establish and maintain rates on fertilizers and fertilizer materials within said State which were less than those permitted or required to be established by the Commission on interstate traffic, and that the maintenance of said rates would cause and result in undue and unreasonable preference and advantage to intrastate commerce and intrastate shippers and localities and in undue and unreasonable prejudice of interstate commerce and interstate shippers and localities and would unjustly and unreasonably discriminate against interstate commerce, in violation of Section 3, and subdivisions (3) and (4) of Section 13 of the Interstate Commerce Act. (R., 188-201.)

Subsequently, on October 14, 1924, the Commission issued an order, Docket No. 16336, instituting an investigation with respect to the Alabama intrastate rates, which order was, in part, as follows:

> "*It is ordered*, (1) That an investigation be, and it is hereby, instituted to determine whether the rates on fertilizers and fertilizer materials required by the Alabama Public Service Commission to be maintained by said railroads, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the

other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, if any, or what maximum or minimum, or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice or discrimination, if any, as may be found to exist." (R. 206-207.)

The proceeding with respect to the Alabama intrastate rates was consolidated with a proceeding which had been ordered by the Commission on its own motion, and entitled "Fertilizers and Fertilizer Materials between Southern Points," Docket No. 16295. This was a general investigation to determine upon a basis of interstate rates for the movement of fertilizers and fertilizer materials throughout Southern territory which would be reasonable and free from undue preference and prejudice, and which would conform "as nearly as may be" to the provisions of the Fourth Section of the Interstate Commerce Act. (R. 37; 207-208.) After extensive hearings, in which the Alabama Public Service Commission and the State of Alabama participated and introduced testimony, filed briefs, and appeared in oral argument, the Commission found, among other things, that:

> "The maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce." (R., 101.)

No order was entered with respect to the Alabama intrastate rates, the Commission stating in its opinion that:

> "It is believed that the respective State commissions will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment." (R., 102.)

The authorities of the State of Alabama refused to permit the Alabama intrastate rates to be increased to the level found reasonable by the Interstate Commission and the level to which that Commission found that said rates should be increased in order to remove the unjust discrimination and undue prejudice against interstate commerce resulting from the rates prescribed and enforced in Alabama by the Alabama Public Service Commission. (R. 10.) Thereupon certain carriers operating in the State of Alabama filed a supplemental petition with the Interstate Commerce Commission and sought an order under which rail carriers in Alabama would be authorized to apply intrastate in Alabama the rates which had been prescribed by the Commission for general application throughout Southern territory. (R. 11.) Subsequently, on October 3, 1927, the Commission entered such an order against certain carriers operating in the State of Alabama, later amended to include all carriers operating in that State, which provided, in part, as follows:

> "*It is ordered*, That the common carriers by steam railroad, parties to this proceeding * * *, according as they respectively participate in the transportation, be, and they are hereby, notified

and required to cease and desist, on or before January 3, 1928, from practising the undue prejudice, undue preference and advantages and unjust discrimination found in said report to exist in the relation of interstate and intrastate rates and charges for the transportation of fertilizers and fertilizer materials within the State of Alabama.

"*It is further ordered,* That the said carriers, according as they respectively participate in the transportation, be, and they are hereby, notified and required to establish, on or before January 3, 1928, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain rates and charges for the transportation of fertilizers and fertilizer materials in intrastate commerce within the State of Alabama which shall be not less, for corresponding distances, than the rates contemporaneously applied by said carriers, in accordance with our order of July 19, 1926, and as subsequently amended, to the transportation by said carriers of fertilizers and fertilizer materials between points in the State of Alabama and points in other states of the United States." (R. 24-25; 225.)

It is this order of October 3, 1927, as subsequently amended, which the appellants sought to enjoin. The lower court entered an order denying the application for an interlocutory injunction (R. 236) and on March 8, 1928, an appeal to this court was allowed. (R. 239.)

In this separate brief for the appellee carriers we desire to emphasize particularly the nature and scope of the proceedings and evidence before the Interstate Commerce Commission, as the result of which the Commission entered the order complained of by appellants,

for the purpose of showing beyond possibility of question that the Commission proceeded in all respects in accordance with the power and authority with which it has been vested; and further, that under the evidence submitted no different order could have been entered by the Commission.

PROCEEDINGS BEFORE THE COMMISSION.

In as much as the Commission consolidated Docket No. 16336, the Alabama case, and also Docket Nos. 16335 and 16484, bringing in issue intrastate rates on fertilizer and fertilizer materials in South Carolina and Georgia, respectively, with Docket No. 16295, the general investigation which the Commission ordered on its own motion for the purpose of determining upon a basis of rates for the movement of fertilizer and fertilizer materials throughout Southern territory, (R. 216) it is necessary to a clear understanding of what transpired in these consolidated proceedings and the scope and nature thereof to have regard not merely to the portion of the record relating specifically to Docket No. 16336, the Alabama case, and the orders entered therein, but to the entire record in the general investigation.

1.

The Announced Purpose and Scope of the Investigation Instituted and Conducted by the Commission.

The report of the Commission in the general investigation, and the cases consolidated therewith for hearing and disposition, is entitled *Fertilizers and Fertili-*

zer Materials Between Southern Points" reported in 113 I. C. C. at pages 389.* (R. 33-131.)

* * * * * * * * *

On March 9, 1925, a notice was issued by the Commission outlining in detail the provisions of the general investigation, Docket No. 16295 and consolidated cases, and indicating certain subjects which it was thought should be developed at the hearings. In that notice, served on all parties of record, it was said:

> "The purpose of the proceeding is to determine upon a basis of rates for interstate application throughout the territory involved which will be reasonable for the transportation of this particular traffic, will be free from undue prejudice and preference, and will conform to the fourth section of the act. With the proceeding there have been consolidated for hearing investigations under section 13 of the act instituted upon petition of the carriers and involving alleged undue preference of intrastate traffic in Alabama, South Carolina, and Georgia, and alleged undue prejudice to interstate traffic. *While other intrastate rates have not been brought in issue, the desirability of fixing interstate rates which can fairly and appropriately be used as a basis for achieving harmony between the interstate and intrastate rates will be kept constantly in mind. With this in view, testimony relating to intrastate adjustments will be freely admitted."* (R. 216-217.)

Then follows the statement that, as an initial step in the investigation, the respondent carriers would be ex-

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*Two supplemental reports were issued which are reported in 123 I. C. C. at page 193, and 129 I. C. C. page 215. (R., 18,131.) These supplemental reports dealt with measure of relief to be accorded various short or weak lines in the Southeast, and with petitions for relief from the long-and-short-haul provision of Section 4 of the Interstate Commerce Act.

pected to present at the first hearing the basis of rates which they believed should be established, together with evidence supporting that basis. A list of some of the more important subjects which the Commission thought should be developed through the evidence is set forth in this notice. (R. 216-217.)

By reference to the order of October 7, 1924, in Docket 16295, inaugurating the *General Investigation*, it will be seen that it is therein recited—

(a) That in many instances interstate rates on fertilizers and fertilizer materials between points in Southern Classification territory differ materially for substantially similar hauls, and that many of said rates are higher for the shorter distances than for the longer distances over the same line or route; and

(b) That from numerous formal and informal complaints to the Commission it appeared that said interstate rates on fertilizers and fertilizer materials were, in general, unsatisfactory to the manufacturers and shippers, and that a general revision thereof had been proposed by the carriers, and that petitions had been filed by carriers operating in the states of South Carolina and Alabama (and later in Georgia), alleging that the rates on this traffic in effect within those states caused undue and unreasonable advantage, preference, and prejudice as between persons and localities in interstate commerce, on the one hand, and intrastate commerce, on the other, and an undue burden and unjust discrimination against interstate commerce. (R. 208-209.)

Thereupon said investigation was by the Commission instituted on its own motion—

> "Into and concerning said interstate rates on fertilizer, fertilizing compounds, and fertilizer ma-

terials, and the charges resulting therefor, applicable between points in the territory described (being Southern Classification territory), with a view to determining whether said rates and charges are unreasonable or are unduly prejudicial to or unduly preferential of particular localities or persons, and to making such order or orders as may be proper in the premises." (R. 208-209.)

In Docket 16336, by the Commission's order dated October 14, 1924, which concerned rates on fertilizer and fertilizer materials within the state of Alabama, it was recited:

(a) That a petition had been filed on behalf of *all the steam railroads* operating in the state of Alabama, averring that the Alabama Public Service Commission by the order therein designated (dated May 26, 1924), had required the railroads in Alabama to establish intrastate rates on this traffic which were less than those permitted or required to be established by the Interstate Commission for interstate traffic;

(b) That said railroads, petitioners, alleged that the observance by the railroads operating in Alabama of the order of the Alabama Commission would cause and result in indue and unreasonable preference and advantage to intrastate commerce, to the undue and unreasonable prejudice and disadvantage of interstate commerce, and would result in unjust and unreasonable discrimination against interstate commerce; and

(c) That by said petition there had been brought into issue rates imposed by the authority of the State of Alabama.

It was accordingly ordered—

(1) That an investigation be instituted, and it was thereby instituted, by the Commission to—

"Determine whether the rates on fertilizers and fertilizer materials required by the Alabama Public Service Commission to be maintained by said railroads, caused or will cause any undue or unreasonable advantage, preference, or prejudice, as between persons or localities in intrastate commerce on the one hand and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce; and as to what rates, if any, or what maximum or minimum, or maximum and minimum shall be prescribed to be charged by the petitioners, in order to remove such advantage, preference, prejudice or discrimination, if any, as may be found to exist;

"(2) That all railroads subject to our jurisdiction operating within said state of Alabama be, and they are hereby, made respondents to this proceeding, and that a copy of this order be served upon each of said respondents, and that the State of Alabama be notified of this proceeding by sending copies of this order, and of said petition, by registered mail, addressed to the Governor of the State of Alabama, at Montgomery, Ala., and to the Alabama Public Service Commission, at Montgomery, Ala.

"(3) That notice of this proceeding be given to the public by depositing a copy of this order in the office of the Secretary of the Commission, at Washington, D. C. (R. 207-208.)

At the opening of the first hearing in these consolidated proceedings at Atlanta, Georgia, on April 20, 1925, Commissioner Eastman, presiding, made the following statement:

"This is Docket No. 16256, an investigation on the Commission's own motion of interstate rates on fertilizer, fertilizing compounds and fertilizer

materials between points in Southern Classification Territory, including rates between points in that territory on the one hand, and the north bank of the Ohio River and Helena, Ark., and points in Virginia on the other. There have likewise been consolidated for hearing at this investigation, Docket No. 16335, rates on fertilizers and fertilizer materials within the state of South Carolina; Docket No. 16336, rates on fertilizers and fertilizer materials within the state of Alabama; and Docket No. 16484, rates on fertilizers and fertilizer materials within the state of Georgia; these three dockets being investigations under Section 13 of the Interstate Commerce Act instituted upon petition of the carriers, and involving alleged undue preference on intrastate traffic and alleged undue prejudice to interstate traffic in the three named states. Various notices have been sent to all interested parties in regard to this investigation, indicating some of the points which the Commission felt ought to be developed in connection with this investigation. I think it unnecessary to burden the record by repeating the substance of those notices at this time." (R. 246, 247)

During the progress of the same hearing, Commissioner Eastman reiterated the purpose of the proceeding, as it concerned intrastate rates, and made it plain that the Commission was endeavoring to prescribe a level of interstate rates and to fix a scale to cover these rates which could fairly and appropriately be used for both intrastate and interstate rates throughout southern territory. On this point he said (R. 412, 413):

"Commissioner Eastman: The intrastate rates in Mississippi are not in issue in the sense that we could make any order with respect to them in this case, but we stated in the notice with respect to this proceeding, following the precedent set in

the class rate case, where the intrastate rates were also not in issue, as follows: 'While other intrastate rates have not been brought in issue, the desirability of fixing interstate rates which can fairly and appropriately be used as a basis for achieving harmony between the interstate and intrastate rates will be kept constantly in mind.' With that end in view, that is with the end of fixing interstate rates which can fairly and appropriately be used as a basis for bringing about harmony between the two classes of rates, testimony relating to the intrastate adjustments will be freely admitted."

The foregoing references to the record indicate some of the reasons which induced the Commission to institute the general investigation of fertilizer rates throughout southern territory. The authorities of the State of Alabama did not question the power of the Interstate Commerce Commission to institute an investigation of this sort. They did not question the fact that in so doing the Commission proceeded within the scope of its powers and duties as imposed not only by the Interstate Commerce Act, including particularly Sections 3 and 13 of said Act, but also by the requirements of the so-called Hoch-Smith Resolution of Congress whereby the Commission is directed to effect a "redistribution" of rates to the end that all commodities and classes of traffic shall contribute, upon a proper and equitable basis, to the maintenance of the transportation system. Neither did the Alabama authorities question the fact that a general investigation of this character, which was in terms made territorial in its scope and included Southern territory as a whole, represents the best and most practicable procedure whereby the Commission can give effect to the

foregoing statutory requirements. On the contrary, the Alabama Public Service Commission, together with the Commissions of other southern states, appeared and participated throughout the hearings, filed briefs, and were heard upon oral argument. (R. 37, 246, 812.)

2.

The Proceedings Before the Commission, Including the Expressions in the Commission's Report, Show Clearly that the Commission Acted Throughout in the Exercise of the Powers and Duties Conferred by Section 13 of the Interstate Commerce Act, as Well as Under Section 3.

In the report rendered by the Commission in Docket 16295 and consolidated cases heard therewith, 113 I. C. C. 389, it will be seen that in the opening sentence it was pointed out at page 391 that—(R. 36)

> "Dissatisfaction on the part of shippers and users as well as of carriers with the rates on commercial fertilizer and fertilizer materials in southern territory has for some time been increasingly evident.
>
> Our decisions upon such formal complaints as have been brought have served only to mitigate the discontent in the particular sections affected.
>
> Interstate rates vary greatly for substantially similar hauls; many indefensible fourth-section departures exist; and the intrastate rates which have been enforced by some of the States are attacked by the carriers as unreasonably low, and it is alleged that they adversely affect manufacturers and dealers shipping into those States over interstate routes. During 1924 three petitions were filed with us by carriers seeking relief under section 13 of the interstate commerce act from the

intrastate rates, respectively, in South Carolina, Alabama, and Georgia."

The Commission then said that three times the rates on fertilizer from Norfolk to points in North Carolina had been under investigation by it in what had come to be known as the *Royster cases;* that the rates there finally prescribed were deemed unsatisfactory by the North Carolina Corporation Commission; and that the foregoing conditions and variations in the rate levels, both interstate and intrastate, obtaining throughout southern territory, led the Commission on October 7, 1924, to institute this general investigation on its own motion. (R. 36) The purpose of this proceeding was then briefly summarized in the report (113 I. C. C. at page 392, R. 31) as follows:

> "The purpose of this proceeding, therefore, is to determine upon a basis of interstate rates for the movement of fertilizers and fertilizer materials throughout southern territory which will be reasonable and free from undue prejudice and preference, and which will conform, as nearly as may be, to the provisions of the fourth section. With the proceeding have been consolidated for hearing and disposition the three section 13 cases already referred to. While other intrastate rates have not been brought in issue, the desirability of fixing interstate rates which can appropriately and fairly be used as a basis for uniformity in both classes of rates has been recognized from the outset."

It is then stated that—

> "At the initial hearing the parties were advised that the principles of the so-called Hoch-Smith resolution are now a part of the law, and that conclusions would be reached with those principles in mind." (R. 37)

Referring to the part taken by the state commissions, it was stated (113 I. C. C. at page 392, R. 37):

> "The state commissions of Alabama, Georgia, Florida, Mississippi, Kentucky, and North Carolina were represented at the hearings, and they took an active and helpful part in developing the record."

It should be noted that the special investigation ordered under Docket 16336 concerning Alabama intrastate rates cannot be considered alone, but must be considered with the *General Investigation*, since the two cases were consolidated and heard together, the *General Investigation* having for its purpose to fix the rate level throughout southern territory which should govern interstate rates and serve as a standard and measure for bringing the intrastate rates into harmony therewith. In fixing that general rate level, the Commission considered not merely the interstate rates, but the intrastate rates in the several southern states and the tonnage and revenue handled thereunder and derived therefrom. (R. 33-131) In determining the rate level to control for the future, the entire field was investigated. There were before the Commission the state scales and the levels of intrastate rates in Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Tennessee and Kentucky. A table inserted on page 397 of its report (R. 44-45) shows representative scales for intrastate application in each southern state, compared with the carriers' proposed scale submitted in the General Investigation. It had before it an analysis of the tonnage of this traffic which moved intrastate, and also interstate. (R. 69-71) It pointed out that about seventy

per cent of the tonnage of fertilizer and fertilizer materials in southern territory is *intrastate traffic* (113 I. C. C. 397, R. 69). It follows that of the total tonnage of this traffic only about thirty per cent is interstate.

Where so large a preponderance of the total tonnage handled within southern territory is intrastate, it is apparent how necessary it is for the intrastate traffic to bear its fair share of the transportation burden and to contribute ratably and equally to the carriers' revenue, if an unjust discrimination against and undue burden upon interstate traffic is to be avoided. Obviously, if the states are to be free to determine the respective levels of intrastate rates in the several states and to do as the State of Alabama has sought to do, to maintain intrastate rates materially lower than the interstate rates prescribed and fixed by the Commission, where such a large percentage of the traffic is intrastate in southern territory, it will follow that the loss resulting from the lower rates on intrastate traffic must be made up by increasing the interstate rates on fertilizers and fertilizer materials, or by placing the additional burden upon other interstate traffic.

The Commission did not view the situation from the standpoint of interstate traffic alone in fixing the rate level. Its revenue test, caused to be made by the carriers during the progress of the hearing, included both intrastate and interstate traffic and the revenues derived therefrom (R. 69-71). The scale which it determined upon was one which it considered reasonably low and one made with a view to placing as light a burden as possible upon fertilizers and fertilizer materials, for the reasons stated in its report and in the light of the Hoch-Smith Resolution, with the positive

expectation and the avowed purpose of bringing intrastate rates into conformity therewith and using the scale so promulgated by it to reconcile the differences and to eliminate the lack of harmony between the interstate and the several intrastate adjustments. A doctrine which would permit the states to depart freely from the standard and the level of rates prescribed by the Commission for interstate traffic, and which recognized any right in the states to maintain substantially lower rates than those promulgated by the Commission for interstate application, would destroy the fundamental purposes of the Interstate Commerce Act, as amended by the Transportation Act, and would render nugatory the efforts of the Commission to adjust rates and establish rate levels which would permit it to discharge its duties under the Interstate Commerce Act, as amended. That such a doctrine, if recognized, would burden interstate commerce is clearly demonstrated and requires no argument to support it. The Commission has pointed out these consequences time and again, and clearly the question of revenue burden and unjust discrimination against interstate commerce flowing from the lower level of intrastate rates was likewise recognized and condemned by this Court in the *Wisconsin case*, 257 U. S. 563, 66 L. Ed. 371.

In that case this Court, after reviewing the law as applied prior to Federal control, and the provisions of the Transportation Act designed to meet the exigencies of the situation brought about by Federal control and the transition from that control to private operation, said (257 U. S. at page 585, 66 L. Ed. 382):

> "It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress, through the Interstate

> Commerce Commission, exercised, was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered, and the abolition of rebates."

After thus stating the extent to which the old law went in this direction, the Court then said:

> "The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in Section 15a to be one of the purposes of the bill."

It must be borne in mind in this connection, and in the light of this quotation, that the Commission undertook in this *General Investigation*, heard along with certain other investigations concerning intrastate rates, to fix the level of the interstate rates and to prescribe the scale to be observed in the future upon both interstate and intrastate traffic uniformly throughout southern territory.

Bearing in mind always that the Commission has found as a fact, after analysis of the movement, that seventy per cent of the tonnage of fertilizer and fertilizer materials moving between points in southern territory is intrastate traffic (R. 69), and that the intrastate traffic must contribute its fair share of transportation revenues, it is apparent that a substantially lower level cannot be permitted in favor of intrastate traffic than that which has been prescribed and which governs the traffic moving interstate.

This Court in the *Wisconsin case, supra,* after having used the language above quoted, then immediately pointed out (66 L. ed. at page 382):

> "Intrastate rates and the income from them must play a most important part in maintaining an adequate national railway system. Twenty per cent of the gross freight receipts of the railroads of the country are from intrastate traffic, and fifty per cent of the passenger receipts. The ratio of the gross intrastate revenue to the interstate revenue is a little less than one to three. If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. *The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system.*" (Italics supplied)

And again (66 L. ed. at page 384), after pointing out that the same transportation systems are used for both state and interstate transportation, it is said:

> "The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it *unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business.* Congress, as the dominant controller of interstate commerce, may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work." (Italics supplied)

And, finally, in response to the argument that the construction upheld in the *Wisconsin case* would give the Commission unified control of both interstate and intrastate commerce, this Court said (66 L. ed. at page 384):

> "It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves *on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (Italics supplied.)

The Court then adds:

> "It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper *an application to the Interstate Commerce Commission for appropriate exception.* So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates * * *."

Commenting upon paragraph 4 of Section 13 of the Interstate Commerce Act, this Court said in the *Wisconsin case* (66 L. ed. at page 382):

> "When we turn to paragraph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interferred with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

In answer to the contention of counsel for the Railroad Commission that the words "undue, unreasonable and unjust discrimination against interstate or foreign commerce" were tautological and meant no more than an undue and unreasonable discrimination as between persons and localities in intrastate commerce, on the one hand, and interstate or foreign commerce, on the other, which precede them in paragraph 4 of Section 13, this Court said:

> "In view of their apt application to the most important purpose of the legislation, we are not at liberty to take such a view. If 'undue, unreasonable and unjust discrimination against interstate or foreign commerce,' are tautological why are they followed by the phrase 'which is hereby prohibited and declared to be unlawful'? To accompany a meaningless phrase with words of such special emphasis would be unusual."
>
> "It is urged that in previous decisions, notably

the Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 57 L. ed. 1511, 48 L. R. A. (N. S.), 1151, 33 Sup. Ct. 729, Ann. Cas. 1916A, 18, the Shreveport Case, 234 U. S. 342, 58 L. ed. 1341, 34 Sup. Ct. Rep. 833, *supra*, and the Illinois C. R. Co. Case, 245 U. S. 493, 62 L. ed. 425, P. U. R. 1918C, 1279, 38 Sup. Ct. Rep. 170, *supra*, the expression 'unjust discrimination against interstate commerce' was often used when, as the law then was, it could only mean discrimination as between persons and localities, and therefore that it is to be given the same limited meaning here. But, here, the general words are used after discrimination against persons and localities has been specifically mentioned. The natural inference is that, even if they include what has gone before, they mean something more. When we find that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important, and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect."

In *Dayton-Goose Creek R. Co. v. United States*, 263 U. S. 456, 68 L. ed. at page 398, in referring to the *Wisconsin case, supra*, it is said:

"This court has recently had occasion to construe the Transportation Act. In Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 66 L. ed. 371, 22 A. L. R. 1086, 42 Sup. Ct. Rep. 232, it was held that the act, in seeking to render the interstate commerce railway system adequate to the country's needs, had, by Sections 418 and 422, conferred on the Commission *valid power and duty to raise the level of intrastate rates when it found that they were so low as to discriminate against interstate commerce and unduly to burden it.*" (Italics supplied.)

The Court then refers to its decision in the *New England Divisions case, Akron, C. & Y. R. Co. v. U. S.*, 261 U. S. 184, in regard to divisions of joint rates, and then, in emphasizing the importance of the new features of the Transportation Act, said:

> "In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation, which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and, in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.
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> "It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that, when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect, and control the commerce with appropriate regard to the welfare of those who are immedi-

ately concerned, as well as the public at large, and to promote its growth and insure its safety."

And in the same case (263 U. S. at page 483, 68 L. ed. at page 400) the Court said:

> "Reliance is also had on decisions of this court in cases where the question was of the reasonableness of state rates, and it was held that evidence to show that the revenue of the carrier from both state and interstate commerce gave a fair profit was not relevant. The state cannot justify unreasonably low rates for domestic transportation, considered alone, upon the ground that the carrier is earning large profits on its interstate business, and, on the other hand, the carrier cannot justify unreasonably high rates on domestic business on the ground that only in that way is it able to meet losses on its interstate business. Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 436, 57 L. ed. 1511, 1556, 48 L. R. A. (N. S.), 1151, 33, Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Smyth v. Ames, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418."

It must be remembered that the Commission found as a fact in these consolidated proceedings that the maintenance of the lower intrastate rates in Alabama prescribed by the Alabama Commission, as contrasted with the level of rates which the Interstate Commission found reasonable and the scale which it promulgated to govern the rates throughout southern territory, would create the undue prejudice and unjust discrimination against interstate shippers and localities and the undue burden and unjust discrimination against interstate commerce forbidden and declared to be unlawful by Sections 3 and 13 of the Interstate Commerce Act. Its specific finding on this point is made at page 435

of its original report (113 I. C. C. at page 435, R. 110). That finding is as follows:

> "That the maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce."

We have, then, a specific finding that the lower Alabama intrastate rates will result (1) in *unjust discrimination against interstate commerce* and (2) in undue prejudice to persons and localities in interstate commerce.

We have just seen what this Court said in the *Wisconsin case*, concerning discrimination against interstate commerce and the dovetail relation between the provisions of Section 13, paragraph 4, of the Interstate Commerce Act, forbidding such discrimination, and Section 15a of the same Act. It was contended by the Alabama Commission in the proceedings before the Commission that the scale which it promulgated for application in Alabama should be used as the standard not only for Alabama intrastate rates, but also to fix the measure of rates throughout southern territory. The Alabama intrastate scale was the lowest scale on fertilizer ever prescribed either by the Interstate Commission or any State Commission and made effective in Southern territory, with the sole exception, perhaps, of certain intrastate rates in Mississippi (R. 706). The carriers had proposed a higher scale, based on rates finally prescribed by the Commission in the *Royster cases*, for application from Norfolk to points

in Carolina territory. (See report of the Commission, 133 I. C. C., at pages 391, 392, and 394) The Royster scale proposed by the carriers was prescribed in *Royster Guano Company v. A. C. L. R. R. Co.*, 50 I. C. C. 34.

Concerning the Royster scale the Commission said in its report (113 I. C. C. at page 396, R. 42):

> "The Royster scale is proposed for uniform application by the carriers because it has been prescribed in two subsequent cases, namely, *Freight Adjustment Steering Committee v. A. C. L. R. R. Co.*, 53 I. C. C. 506, decided June 9, 1919, and *Goldsboro Chamber of Commerce v. A. C. L. R. R. Co.*, 91 I. C. C. 315, decided July 10, 1924, and because rates as high as or higher than that scale have been prescribed or approved in still other cases. It is, therefore, considered that this scale has been impressed with our sanction."

On the other hand, the shippers and manufacturers advocated the adoption for uniform application throughout southern territory of a scale which was the Alabama scale, that being, as stated, the lowest scale, with perhaps one exception, in effect in southern territory. In its report the Commission said, in part, concerning the shippers' proposal (113 I. C. C. 403, R. 55, 56):

> "The shippers' case was presented largely by representatives of manufacturing organizations, members of the National Fertilizer Association. The Alabama Public Service Commission also took an active and important part in support of the rates proposed. Testimony was offered on behalf of the Kentucky Railroad Commission, a statement was made by one of the North Caro-

> lina commissioners, and helpful cross-examination was conducted by representatives of the Florida, Georgia, and Mississippi commissions. *The shippers are at one with the carriers in urging uniformity in the rates; the predominant issue is with respect to their level.*" (Italics supplied.)

The Commission then refers to its decision in the *Blackshear case*, 87 I. C. C. 654, and the contention made by the shippers that the Commission had therein disregarded the Royster scale. It also refers at some length to the scale prescribed by the Alabama Commission which was urged by the shippers for adoption in this preceeding, that scale being shown in its entirety in Appendix C to the report in 113 I. C. C. 389, at page 443 (R. 112, 113), where the shippers' proposed scale (the Alabama scale) is compared with the carriers' proposed scale and with the Memphis-Southwestern scale. The Commission points out at page 404 that the shippers advocate strict adherence to the distance principle and the observance of the distance scale, modified in its application to provide for very limited groupings so as to preserve industrial districts or groups, such as the Atlanta district, the Birmingham district, etc. (R. 57,58.) At page 405 of the report of the Commission it is said:

> "One of the shippers' principal witnesses admitted that the rates which they propose are, with the exception of rates within Mississippi and for short distances in Georgia, lower than any existing fertilizer rates in southern territory that have been prescribed either by us or by State commissions." (R. 58)

And then, at page 406, after having reviewed the contention of the shippers in regard to the method by

which the Alabama scale was derived, the Commission further said concerning the origin of this scale (R. 59):

> "The carriers contend that the Alabama scale, the basis of the shippers' proposed rates, is unduly low and was influenced by intrastate rates fixed by the Georgia commission. In 1907 the Alabama Legislature passed a statute which, it is said, prescribed the same distance scale of rates on fertilizer as was then in effect in Georgia. This action, the carriers say, was taken without any public hearing and resulted in substantial reductions. The scale so prescribed, subject to the subsequent general rate changes, remained in effect until July 25, 1924, when the *Alabama commission promulgated the present intrastate scale, resulting in a further average reduction of about 7 per cent.*" (Italics supplied.)

At pages 406-7 of its report the Commission made this further statement concerning the position of the shippers who were advocating the Alabama Commission's scale, admittedly the lowest scale in the South (R. 60):

> "As the position of the shippers is understood, not so much stress is laid on rate comparisons to sustain their scale as on the economic advantages accruing through the use of fertilizer, and the absolute need for its use if southern agriculture is to be at all successful."

After reviewing the economic considerations stressed by shippers, the amount of fertilizer used throughout southern territory, as contrasted with the tonnage used in the southwestern states, and after having given consideration to and having analyzed the voluminous evidence submitted by the interested parties, including the

results of the traffic test made, the Commission then proceeded at pages 416-427 of its report (113 I. C. C. 389; (R. 71-86) to discuss the rate level for the future, and in so doing it made a comprehensive statement of the salient points made by the carriers and shippers in regard to the scales proposed by them, respectively, and made brief comments thereon in regard to these contentions; and it found that the record supported one uniform level of rates throughout southern territory on this traffic.

At page 422, in emphasizing that there was no dissent from the proposition that a uniform level of fertilizer rates is desirable throughout southern territory, and in finding that the evidence sustained the adoption of one uniform level, the Commission said (R. 80):

> "Carriers and shippers agree, with a single exception that a uniform level of fertilizer rates is desirable throughout all of southern territory. The single exception is the Florida East Coast, which desires a somewhat higher level to and from points in the Florida peninsula. *Considering all the circumstances surrounding this particular form of traffic and the general agreement upon this point, resulting in a paucity of evidence to the contrary, we think that the record supports one uniform level.*" (Italics supplied.)

It then proceeded to promulgate and fix what it considered to be, using its informed judgment and the facts developed by the record, the reasonable level of fertilizer rates to be thereafter observed for both interstate and intrastate application.

It must be borne in mind that throughout the proceeding it had been conceded by all parties of record,

as the Commission points out, that one uniform level should prevail, that one scale should be promulgated to govern the rates, both interstate and intrastate, and that the difference between the parties, consisting of the railroads on the one side and the state commissions, shippers' organizations and representatives on the other, concerned principally the rate level to be observed in the future. That level has now been fixed by the Commission. The scale to be used in revising the rates has been prescribed by it, and that finding and its order promulgating the scale so prescribed is not attacked, and cannot be attacked since it was made upon an ample record and after a comprehensive analysis of the evidence and findings concerning the facts established thereby; it is binding upon the carriers and shippers alike, although they might have entertained different views as to the rate level which should have prevailed. In fixing the rate level, the Commission states that it had in mind the requirements of the Hoch-Smith Resolution and the redistribution of the so-called transportation burden thereby and therein required. It states at page 421 of its report that upon sound economic grounds fertilizer is a commodity (R. 78):

> "Which should be leniently treated in distributing the burden of freight transportation. The need for continued progress in the use of fertilizer is so great and the degree of its use, as this record clearly shows, is so dependent upon financial considerations that all burdens associated with its use should be made as light as possible."

With these considerations in mind, the report clearly indicates that the Commission promulgated a scale which would give effect to those economic considera-

tions and would bear as lightly as possible upon the fertilizer traffic, having regard to other requirements of the law under which it was functioning as to the maintenance of an adequate transportation system, and that other commodities or branches of traffic must not be unduly burdened.

We have the fact conceded, then, by all parties, that there should be one uniform level of rates on fertilizer and fertilizer materials throughout southern territory, and the positive finding of the Commission that the record justifies the conclusion that a uniform scale should apply to determine the rate level. That scale, as stated, has been fixed by the Commission. *It was fixed on the assumption and with the understanding and the positive expectation that the intrastate rates and the interstate rates should be harmonized and made uniform by the use of the standard of reasonableness represented by the scale prescribed by the Commission.*

The revenue test made by the carriers, under the direction of the Commission and at its request, included the tonnage and revenue derived from this traffic moving intrastate as well as interstate throughout the South. In reaching a rate level, and in fixing the scale promulgated by the Commission, this test was used and the conclusions in regard thereto arrived at in the report were based upon the assumption that the intrastate rates would be placed upon the same level as the interstate rates, and that uniform level is reflected in the scale prescribed. (Note, in this connection, what the Commission said in its report concerning the revenue test, at pages 413-415.) (R. 69-73.)

It was shown by that test that of the total tonnage

of fertilizer and fertilizer materials, 70 per cent was intrastate traffic. The Commission said, 113 I. C. C., at page 397 (R. 43):

> "About 70 per cent of the tonnage of fertilizer and fertilizer materials moving in southern territory is intrastate traffic * * * ".

At page 414 of the same report, it found that out of the total revenue of $7,947,908 received from the transportation of fertilizer and fertilizer materials during the *two-months period* covered by the test, almost 60 per cent, or $4,753,932, accrued on intrastate traffic. (R. 69, 70) The Commission's report further shows that if the Alabama intrastate scale were adopted as the measure to fix the level of rates throughout the territory, the *revenue* of the carriers would be reduced approximately $1,272,000 on an annual basis, (113 I. C. C. 415, R. 71) and that the records so show was admitted by the Alabama Public Service Commission in its petition for rehearing, dated October 30, 1926, and filed before the Commission in said consolidated proceeding known as Docket No. 16295 and Docket No. 16336. (R. 1034, 1035.)

The Commission said that the scale which it prescribed to govern the interstate level, if applied to both interstate and intrastate tonnage of fertilizer and fertilizer materials, moving throughout southern territory, would about preserve the carriers' existing revenues. Bearing in mind that the shippers and carriers agreed that a uniform level of fertilizer rates should be established throughout all of southern territory; that the Commission found that the record supported one uniform level, and fixed a level to control the rates for the future which would substantially preserve the

carriers' then existing revenues from the traffic, if applied upon both interstate and intrastate traffic, it is apparent that the Alabama Commission, being disappointed in its expectation that its contention and its scale would prevail, is seeking to maintain in Alabama a level of rates substantially lower than that which the Interstate Commission, in the consolidated proceedings, fixed to govern the rates throughout southern territory, both interstate and intrastate, and upon the assumption that the rates so promulgated would apply to both classes of traffic. Had it been applied only to interstate traffic, the revenue test shows that the carriers' revenues would have been materially reduced. The Commission found, 113 I. C. C., at page 419, (R. 76) that—

> "In his proposed report the examiner recommended a scale somewhat higher than the shippers' scale and somewhat lower than the carriers'. Upon argument the carriers conceded that the scale so recommended would about maintain their aggregate revenues. But our decision can not properly be predicated solely upon an attempt to average existing rates and maintain revenues."

In the petition for rehearing filed by the Alabama Commission in said consolidated proceedings, it was conceded by that tribunal that the rates which the Commission had prescribed on fertilizer and fertilizer materials were apparently designed to preserve aggregate revenues of the carriers from this traffic. It is then urged in the petition of the Alabama Commission that the Interstate Commission should have given greater consideration to the provisions of the Hoch-Smith Resolution.

It cannot be successfully contended that the Interstate Commission did not give full consideration to the provisions of that part of the Interstate Commerce Act, for it said, 113 I. C. C. 419 (R. 76, 77)—

> "The traffic test furnishes evidence as to the level of existing rates, both interstate and intrastate on fertilizer in southern territory; but while this evidence is entitled to weight in arriving at maximum reasonable rates it is not controlling.
>
> "The doctrine that the burden of rail transportation should be distributed among the various kinds of freight with some regard for the economic needs of the country has always had recognition, in one way or another, in the rate structure. The familiar principle of 'charging what the traffic will bear' or, as some prefer to put it, of 'not charging what the traffic will not bear,' has no doubt had that result in some degree. The principle which has been quite generally recognized in public regulation, that the value as well as the cost of service is a factor entering into the determination of just and reasonable rates, has had a similar result. In another form the same thought seems to be predominant in the Hoch-Smith resolution. But the inevitable result of such a distribution of the transportation burden must be that some kinds of freight traffic, under just and reasonable rates, will earn materially less for the carriers than others."

The Commission then pointed out (R. 77) that—

> "There are manifest limitations to the doctrine. It may be conceded that we have no power to fix rates upon any kind of freight which will fail to produce some margin over operating cost."

Then, after considering the contention of the carriers, it is said, at page 421 of its report (R. 78):

"It may be that such a change in the level of fertilizer rates, up or down, as could reasonably be considered would in itself have comparatively slight effect upon the financia. status of the southern farmer. But that does not alter the fact that upon sound economic grounds fertilizer is a commodity which should be leniently treated in distributing the burden of freight transportation. The need for continued progress in the use of fertilizer is so great and the degree of its use, as this record clearly shows, is so dependent upon financial considerations that all burdens associated with its use should be made as light as possible."

With these considerations in mind, as has been pointed out above, the Commission fixed a scale to determine the level of rates and in so doing, to use its own language, it dealt leniently with this traffic and so adjusted the rates and the level of its scale as to make what it deemed to be a rate level which would respond to those considerations and make the costs of transportation as light as possible, having regard to its other duties and responsibilities under the Interstate Commerce Act. It thereupon fixed a scale which was materially less than the level of rates which it had theretofore approved in the series of *Royster cases* and in other cases cited in its report, for application upon fertilizer and fertilizer materials in the Carolinas, and in certain other sections of southern territory. It declined to adopt a level as low as the shippers advocated which, as has been repeatedly stated, was the scale promulgated by the Alabama Commission, but said, at page 424 (R. 82) of its report:

"Upon the record before us no other method of determining just and reasonable rates is possible than the exercise of our best judgment in the light

> of all the evidence submitted. After careful consideration of this evidence, which we have summarized above, *and having in mind the principles which we believe should be applied in distributing the burden of rail transportation* and which are also set forth above, we have reached the conclusion that a scale somewhat different from that recommended by the examiner, but producing much the same aggregate revenue, should be adopted." (Italics supplied.)

This scale was to control and fix the rate level not only upon interstate traffic, but also upon intrastate traffic. The fact that intrastate rates were lower than interstate rates in many sections of Southern territory, including the State of Alabama, cannot in any way militate against the findings of the Commission as to the level of this scale, in as much as the elimination of the differences in the rates levels not only interstate, but intrastate, were among the objects sought to be accomplished by this General Investigation, and the different rate levels, whether interstate or intrastate, were to be reconciled and one uniform level established, according to the concessions made by all parties and according to the finding by the Commission that the record justified and required one uniform rate level throughout southern territory.

While we have discussed, at the risk of tediousness, the purposes sought to be accomplished by this General Investigation, our excuse for the extent to which the Commission's findings have been dwelt upon is that we desire to impress the salient points considered by the Commission in fixing the standard to be used in bringing about what it found to be necessary, namely a uniform level of freight rates on fertilizer and fertilizer

materials to be applied uniformly throughout southern territory upon not only interstate, but intrastate traffic, so adjusted as to give recognition to all of the economic considerations urged and to all of the requirements of the Hoch-Smith resolution, as well as other provisions of the law under which it functions, and to eliminate the undue burden upon and unjust discrimination against interstate commerce brought about by the *lower intrastate rates*, and the undue prejudice and unjust discrimination against persons and localities served in interstate commerce.

The record presented not merely a Section 3 case, or a question of discrimination against persons or localities, as appellants contend, but it went far beyond that, as the foregoing quotations from the findings and report of the Commission will show. It dealt with the field of interstate commerce as a whole, so far as this branch of traffic is concerned, the various disparities and differences in the level not only of the interstate rates, but of the intrastate rates on this traffic throughout southern territory, the necessity for removing these disparities and avoiding placing an undue burden upon and continuing the unjust discrimination against interstate commerce; and the establishment for the future of a standard which could be used for interstate rates as well as for intrastate rates, which latter had been brought directly before the commission.

It will not do to argue, as the appellants do that the State Commission of Alabama can impose a lower scale for intrastate application and can require the maintenance of a lower level of rates intrastate in Alabama than the Interstate Commission has found to be reasonable and has ordered applied. If that doctrine were once recognized, it could be fol-

lowed by the State of Georgia, if the Georgia Commission saw fit,—as it has not done—to decline to follow the standard fixed by the Commission and should order the lower intrastate rates for application in Georgia. If the intrastate rates on the other side of the state line were thus made lower than the corresponding interstate rates, it requires no argument to show that the interstate adjustment must inevitably be broken down and controlled by the lower intrastate rates in Georgia, on the one hand, and in Alabama on the other, if the states were permitted to disregard the level fixed by the Commission.

However, if Alabama is to be permitted to maintain rates upon a lower level than the prescribed interstate adjustment, the same privilege would have to be accorded other states, and the record clearly indicates that uniformity of rate levels is the only solution for these difficulties which would arise if the states, by successful independent actions, were left free to do what the Alabama Commission here contends it should be permitted to do, namely, to ignore the scale of rates promulgated by the Interstate Commission under the circumstances aforesaid, and substitute its own independent judgment, and the lower level of rates, for the judgment of the Interstate Commission and the level of rates which it has prescribed with all the light before it thrown upon the problem by this comprehensive proceeding, embracing as it does the whole of southern territory, and presenting the views of all interested parties, including the Alabama Public Service Commission, which was heard at length upon and concerning the scale it advocated and its reasons for promulgating and advocating the same.

The point is that there is a very real question of

revenue burden and discrimination against interstate commerce involved, should the contention of the appellants be recognized and the states be left free to depart at will from the level of rates promulgated by the Commission and which the carriers must apply, under its orders. This Court has said that the effective operation of the Act reasonably and justly requires that the intrastate traffic should pay its fair share, and that the Commission cannot discharge the large and important duties imposed upon it unless compensation is received for the intrastate business comparable with that which it authorizes for the interstate business, and further, that state authorities may deal with intrastate rates only "on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

3.

The Contentions of Appellants Ignore the Proceedings in the General Investigation of Fertilizer Rates, Docket 16295, and Proceed Upon the Erroneous Assumption that Docket 16336 is to be Separately Considered, and Upon the Further Erroneous Assumption That Under That Docket There was Involved Only a Question of Section 3.

Aside from the contention in regard to the alleged lack of a further hearing before the order attacked by appellants, being the order of October 3, 1927, as supplemented by order of December 22, 1927 (R. 24-25; 225) was entered, the contention of appellants is that the investigation ordered by the Commission in regard to Alabama intrastate rates in Docket 16336 concerned discrimination against persons and localities under

Section 3 of the Act alone, and that the evidence, while showing a discrimination in some instances, was not sufficient to justify the sweep of a state-wide order.

This theory takes too narrow a view of the investigation ordered by the Commission in Docket 16336, which was heard along with the General Investigation, and ignores the very terms of the order inaugurating the investigation in Docket No. 16336. Upon reference to that order (R. 206-207) it will be noted that all railroads subject to the jurisdiction of the Commission operating within the State of Alabama were made respondents; that notice was directed to be served on the State of Alabama in the manner indicated, as well as on the Alabama Public Service Commission, and that the scope of the investigation was not limited to any inquiry in regard to the discrimination against persons or localities, but it likewise embraced an investigation as to whether the lower intrastate rates in Alabama constituted any undue, unreasonable, or unjust discrimination "against interstate or foreign commerce." This investigation so ordered was set for hearing and was heard with the General Fertilizer Investigation which had for its purpose the fixing of a rate level to be observed throughout southern territory, taking into consideration the revenues resulting therefrom, the tonnage moving, including both interstate and intrastate, and as a result of said consolidated proceedings the rate level, and the scale to be used in maintaining that level, were fixed and determined by the Interstate Commerce Commission. It determined that the rates which the Alabama Commission had promulgated for intrastate application in Alabama would not only discriminate under Section 3 against persons and localities, but that they would likewise discriminate

against interstate commerce and constitute a revenue burden upon interstate commerce, all of which was prohibited and declared to be unlawful by the provisions of paragraph 4 of Section 13.

The situation cannot be viewed solely from a Section 3 standpoint, as appellants have attempted to do. They overlook the scope of the General Investigation in Docket No. 16295, as well as the scope of the investigation in Docket No. 16336, heard therewith and as a part thereof.

Paragraph 4 of Section 13 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, provides as follows, (41 Stat. L. 484; Fed. Stat. Ann. 1920, Supp. page 106):

> "Whenever in any such investigation the Commission after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding."

Concerning paragraph 4 of Section 13, which has just been quoted, this court said, in the *Wisconsin case*, (66 L. Ed. at p. 382):

> "When we turn to paragraph 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

It will be noted that under said paragraph 4 of Section 13 of the Interstate Commerce Act, as amended, the Commission, after instituting such an investigation as is contemplated by paragraph 3 of Section 13, or whenever in any investigation under other provisions of the Act the Commission finds, after full hearing, that the intrastate rates "cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in interstate commerce, on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," which is thereby forbidden and declared to be unlawful, it is commanded, then and in that event, to prescribe the rates, or the maximum or minimum, or maximum and minimum, thereafter to be charged. And the section then commands and requires that such rates shall be observed while in effect by the carriers parties to such investigation affected thereby—

"the law of any State or the decision or order of any State authority to the contrary notwithstanding."

The Commission, having found the unjust discrimination and the undue prejudice condemned by the Act to exist and to be brought about by the intrastate rates called in to question, is required to remove the discrimination and not only that, but to direct how it shall be removed and to prescribe the rates to be thereafter observed for the future, the law of any State or the order of any State commission to the contrary notwithstanding.

The contention of appellants completely ignores this requirement of the law and the duty thereby imposed upon the Interstate Commission. It likewise ignores the fact that the Commission not only found an unjust discrimination against persons and localities served in interstate commerce, but it found an unjust discrimination against interstate commerce itself brought about by the maintenance of the lower rates prescribed by the Alabama Commission.

It will not do, therefore, to argue, as appellants do, that the case was purely one under Section 3, and what was said by this Court in the *Wisconsin case* with regard to the sweep of an order based solely on a violation of Section 3 can have no application here. It should be noted, however, in passing, that even if the case were based on Section 3 alone, and the investigation included only unjust discrimination against persons and localities, the evidence is very full and complete to sustain the proposition not only that there is such discrimination, but that to remove it effectively it would be necessary to revise the entire body of intrastate rates in Alabama due to the conflict between

the intra and interstate rates and the competition brought about by shipments from numerous intrastate plants and interstate plants and the inextricable difficulties and hardships which would arise were the intrastate plants, located at numerous points within the State of Alabama, permitted to continue to ship on the lower level of intrastate rates against the numerous interstate plants shipping, or attempting to ship, into Alabama in competition with the local plants. We shall later refer to this evidence in some detail.

But we have presented a case of much broader scope, and one which concerns not only the discrimination against persons and localities forbidden by Section 3, but the discrimination against interstate commerce forbidden by paragraph 4 of Section 13, and the inevitable effect of the lower intrastate rates upon the revenues of the carriers, if it be once conceded or recognized that state commissions can depart at will from the level of interstate rates fixed and prescribed by the Commission in the General Investigation and thus either compel an increase in the *interstate rates* to make up the loss sustained by the lowering of the *intrastate rates*, or the loss must be made up by increasing interstate rates on other commodities.

We have the fact that the Alabama intrastate rates, if applied throughout the territory, would mean a loss in net revenue to the carriers of at least $1,250,000 annually (R. 71), as compared with their present revenues from this traffic. The Commission found and held that the scale which it prescribed, if applied to both intrastate and interstate shipments of fertilizer and fertilizer materials, would about balance the existing revenues of the carriers, thereby lowering very generally the interstate level and increasing in some states

the intrastate rates so as to bring the rates into harmony, using the level and yardstick prescribed by the Commission. If one state could depart from that level and make lower intrastate rates, other states may make even more serious departures, thereby further depleting the carriers' revenues; but we have it established of record that the extent to which the Alabama Commission has gone, and the rates which it advocates, if applied throughout the territory to both interstate and intrastate traffic, would result in a loss of at least $1,250,000 annually. (R. 71.)

It has been decided by the Commission that one level must prevail. It has been decided by that tribunal that the Alabama rates are too low for application or adoption, and are less than it can lawfully prescribe or require the carriers to operate. We are, therefore, confronted squarely with the question whether the Alabama intrastate level, or a lower level if certain states should think fit to promulgate the same, shall prevail for intrastate traffic, in disregard of the rate level and revenue requirements as fixed and ascertained by the Commission. Bear in mind that that tribunal is the instrument created by Congress to carry out the provisions of the Interstate Commerce Act. It can not discharge its functions or fulfill its duties in regard to the fixation and maintenance of rate levels and revenue returns required by the Act, nor can it control or exercise the initiative necessary to bring about such a distribution of the transportation burden as is contemplated by the Hoch-Smith resolution, when read in the light of the other provisions of the Interstate Commerce Act, as amended, if its efforts so to do and its orders and requirements can be departed from and disregarded by state commissions throughout

southern territory. As this Court said in the *Wisconsin case, supra*, 66 L. Ed., at page 383:

> "Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation."

And again, at page 384:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonably compensatory return for all the work it does. The states are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which would burden it *unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business.* Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work. The affirmative power of Congress in developing interstate commerce agencies is clear (citing cases). In such development, it can impose any reasonable condition on a state's use of interstate carriers for intrastate commerce it deems necessary or desirable. This is because of the supremacy of the national power in this field." (Italics supplied.)

Significant also is the statement, in the same opinion, 66 L. Ed., at page 384, that state authorities must deal with intrastate rates *"as between themselves on the general level which the Interstate Commerce Commission has found to be fair for interstate commerce,"* and the further statement that:—

> "So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates * * *."

Fertilizer tonnage, and materials used in the manufacture of fertilizer, constitute a considerable portion of the tonnage of the carriers. (113 I. C. C. at p. 393, R. 37-38.) That branch of traffic must contribute its fair share of transportation revenues. What that contribution shall be in the distribution of the so-called transportation burden is confided to the Commission in that, under Section 15a, it must initiate and permit the establishment of rates upon all traffic which will yield, in the aggregate, the prescribed return. It has given consideration to the requirements of the Hoch-Smith resolution in the General Investigation which it had conducted and so states in its report. It has dealt leniently with this particular branch of traffic, and has made the transportation charges therefor as light as it thinks it can consistently do, having in mind the volume of the tonnage, the economic considerations mentioned in its report, the distribution of the traffic, its relation in volume and tonnage to other traffic, and the proportion which moves single line, as well as in interline service, and the proportion handled in intrastate commerce and interstate commerce, respectively; all of which will appear from its report in its General Investigation, 113 I. C. C., 389. (R. 33-131.)

Having discharged to the best of its ability, in the light of its informed judgment, the responsibilities and

duties placed upon it in this regard, all that it has sought to accomplish with respect to the uniform system of rates on this traffic, to be applied throughout southern territory, will be frustrated and destroyed if it be once recognized and declared that state commissions shall be free to maintain lower rates on this traffic and to disregard the standard set by the Commission whenever the state commissions shall think proper so to do. If that can be done, and the findings and orders of the Commission disregarded in the case of fertilizers and fertilizer materials, what will be the effect in regard to revisions of rates on other commodities? How shall the Commission accomplish the important purposes sought to be attained by the Interstate Commerce Act, as amended by the Transportation Act, if these departures from the interstate level are to be freely permitted in the discretion of state commissions? And how can the chief purposes of the Transportation Act be attained if we ignore the destructive effect upon revenues of successive reductions in rates by state authorities, thus disregarding the standard fixed by the Commission?

Concerning the necessity for obviating this destructive effect upon the interstate revenues, and pointing out that to achieve the paramount purposes of the Transportation Act it was necessary to incorporate such a provision as that found in Paragraph 4 of Section 13, this Court said, in the *Wisconsin case*, 66 L. Ed., at page 383:

> "But, here, the general words are used after discrimination against persons and localities has been specifically mentioned. The natural inference is that, even if they include what has gone before, they mean something more. When we find

> that they aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important, and which would seriously obstruct its chief purpose, we cannot ignore their necessary effect."

And again, in the same opinion, at page 382, it was said concerning disparities between intrastate rates and revenues and those in the interstate branch of the service:

> "If the rates, on which such receipts are based, are to be fixed at a substantially lower level than in interstate traffic, the share which the intrastate traffic will contribute will be proportionately less. If the railways are to earn a fixed net percentage of income, the lower the intrastate rates, the higher the interstate rates may have to be. The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system."

After pointing out that Section 15a, by its terms, conferred no direct power on the Commission to deal with the intrastate rates, and that what is done under that section is to be done "in the exercise of its powers to prescribe just and reasonable rates," the Court then said:

> "When we turn to paragraph 4, Sections 13, however, and find the Commission for the first time vested with a direct power to remove 'any undue, unreasonale, or unjust discrimination against interstate or foreign commerce,' it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. *If that purpose is interfered with by a disparity*

of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words.'' (Italics supplied.)

The Commission has found that the maintenance of the lower Alabama intrastate rates will constitute not only an unjust discrimination and undue prejudice against localities served in interstate commerce, but that it will constitute, and does constitute, an undue, unreasonable and unjust discrimination against interstate commerce itself. (R. 101.) It has ordered the discrimination removed and, as required by paragraph 4 of Section 13, it has prescribed the method to be used in removing the discrimination and the rates thereafter to be observed. Those rates have been ordered by it to be placed on the level prescribed by it for application throughout southern territory, having regard to both interstate and intrastate tonnage of fertilizer and fertilizer materials moving within that territory. (R. 101, 24, 25, 225.)

4.

The Commission's Finding of Unjust Discrimination and Undue Prejudice to Persons and Localities in Interstate Commerce, and Against Interstate Commerce Caused by the Maintenance of the Lower Alabama Intrastate Rates, is Based on Substantial Evidence and Supported by the Evidence of Record.

The Commission had before it in Docket 16295, the *General Fertilizer Investigation*, the question of the

general basis of rates on fertilizer and fertilizer materials in southern territory and the scale to be prescribed for uniform application over the standard lines between points in that territory. After taking evidence at three separate hearings and affording opportunities to be heard to all parties in interest, including the State of Alabama and the Alabama Public Service Commission, and after an exhaustive investigation concerning the proper level of rates to be applied, we have seen that the Commission found and held that, in view of the characteristics of this traffic, it was reasonably entitled to a relatively low basis of rates, and that it fixed a distance scale, which was prescribed for uniform application throughout southern territory, with the expectation and understanding that it would be applied upon both interstate and intrastate traffic. The level of the scale was determined, not solely with regard to interstate traffic, but having regard to the traffic as a whole, the tonnage movement, and the revenue derived therefrom under existing rates.

We have seen that the Commission found that its scale, so promulgated, if applied uniformly within southern territory upon both interstate and intrastate traffic, would about preserve the level of the carriers' revenues under the then existing (but varying) rate levels. It can not be contended, and is not contended, that these findings of the Commission, and the mandate of its order fixing the rate level and prescribing the scale to govern, were not supported by ample evidence of record. There is no attack by appellants upon the order in the *General Investigation*, Docket No. 16295, fixing the rate level and prescribing the scale, or upon the supplemental orders determining the mat-

ter of fourth-section relief and of minor group adjustments. That phase of the investigation, and those findings and orders, are in no way questioned by appellants. Their main contentions seem to be: (1) That the finding of undue discrimination is not supported by substantial evidence, and (2) That the Alabama Public Service Commission has not been accorded a hearing.

That there was ample evidence before the Commission in these consolidated proceedings to justify its findings of unjust discrimination and undue prejudice brought about by Alabama intrastate rates which were generally lower than the interstate level can not be successfully denied. We will briefly review some of this evidence.

Exhibit No. 46, introduced before the Commission and reproduced as Appendix A* to this brief, shows the location of fertilizer plants in Southern territory. It will be observed, upon reference to this exhibit, that there are numerous plants located in Georgia, Tennessee, Mississippi and Florida contiguous to the State of Alabama.

There is a heavy movement of fertilizers and fertilizer materials from interstate points of origin to destinations in the State of Alabama. The following statement, reproduced from Statement D of Exhibit No. 492, filed before the Commission, shows the state and interstate movements to Alabama destinations during March and April, 1925, the period covered by the revenue test, which the carriers made at the direction of the Commission:

*This exhibit is not in the printed record, but is reproduced here in accordance with the stipulation of the parties. (R. 1013.) Portions of exhibits not in the printed record which may be reproduced at interpoints herein are likewise reproduced in accordance with the stipulation referred to.

Destined to		Number of Cars	Weight Tons
Alabama	Intrastate	8,621	242,465.44
	Interstate	3,976	103,441.18

It will be observed that during this two months period 12,597 carloads of fertilizers and fertilizer materials moved to destinations in Alabama. Of this number 3,967 carloads moved from *interstate* points of origin. The movement from interstate origins to Alabama during this two months' period aggregated 103,500 tons. In as much as the movement for this two months' period represents approximately one-half of the annual movement (R. 69) it is obvious that the annual movement of fertilizer from *interstate* points to Alabama destinations aggregates approximately 7,952 carloads.

Witness Drescher, Assistant to the Vice President in charge of traffic of the Louisville & Nashville Railroad, was the principal witness for the carriers with respect to the discrimination in favor of Alabama shippers and localities against interstate shippers and localities and testified at length concerning the Alabama intrastate rates as compared with the rates from manufacturing and shipping points in adjacent States. (R. 441-482.) He introduced numerous exhibits showing rates, distances, and movement of traffic from Alabama points as compared with interstate points and pointed out the discrimination against interstate shippers. (R. 602.) In selecting points in other States from which he compared the rates with the Alabama intrastate rates he undertook to use fertilizer manufacturing points which sold their products in Alabama in competition with Alabama fertilizer manufacturers. (R. 453.)

Mr. Drescher compared the rates from Birmingham, Alabama, and Nashville, Tennessee, to Alabama points on the Louisville & Nashville Railroad between Birmingham and Nashville; the rates from Decatur, Ala., and Chattanooga, Tenn., to intermediate Alabama points on the line of the Southern Railway; the rates from Birmingham, Alabama, and Rome, Georgia to intermediate Alabama points on the Southern Railway; the rates from Birmingham, Alabama, with the rates from Columbus, Georgia, to intermediate Alabama points on the Central of Georgia Railway; the rates from Birmingham with the rates from Atlanta, Georgia, to intermediate Alabama points on the Southern Railway; the rates from Montgomery, Alabama, with the rates from Richland, Georgia, to intermediate points on the Seaboard Air Line Railway; the rates from Montgomery, Alabama, with the rates from Columbus, Georgia, to intermediate points on the Central of Georgia Railway; the rates from Decatur, Alabama, with the rates from Corinth, Miss., to intermediate points on the Southern Railway; the rates from Birmingham, Ala., with the rates from Tupelo, Miss., to intermediate points on the St. Louis-San Francisco Railway; the rates from Mobile, Ala., with the rates from Pensacola, Florida, to stations on the Louisville & Nashville Railroad between Flomaton, Ala., and Montgomery, Alabama; the rates from Eufala, Ala., with the rates from Columbus, Ga., to stations on the Central of Georgia Railway in Alabama, and the rates from Birmingham, Ala., with the rates from Meridian, Miss., to intermediate Alabama points on the line of the Alabama Great Southern Railroad. (R. 452-462.)

Obviously we can not reproduce all of the exhibits filed by Mr. Drescher illustrating this discrimination

against interstate localities and shippers. We will, however, reproduce as Appendix B to this brief, his Exhibit No. 291 filed before the Commission, which is illustrative of the discriminatory situation.

Birmingham, Alabama, and Nashville, Tennessee, are both located on the main line of the Louisville & Nashville Railroad. Fertilizers are consumed at Alabama points between Birmingham and Nashville and both Birmingham and Nashville manufacturers undertake to distribute their products at these intermediate stations. Exhibit No. 291 shows the distances from Birmingham and Nashville to intermediate Alabama stations, the rates at the time of the hearing before the Commission from both Birmingham and Nashville, and also the movement of fertilizer to these stations from Birmingham and Nashville for the months of March and April, 1925. The exhibit also shows that Nashville manufacturers of fertilizers sell their product at stations on this line as far south as Boyles, Alabama, which is only 3 miles north of Birmingham.

The discrimination which existed against Nashville in favor of Birmingham and in favor of intrastate traffic against interstate traffic is apparent from the exhibit. For example, Athens, Ala., is 98 miles from Birmingham and 107 miles from Nashville. At the time of the hearing the rate on fertilizer, in carloads, from Birmingham to Athens was $1.95 per ton and from Nashville to Athens it was $2.59 per ton. At Elkmont, Alabama, 107 miles from Birmingham and only 98 miles from Nashville the rate from Birmingham was $2.05 per ton while the rate from Nashville was $2.59 per ton.

These are typical examples of the discrimination against interstate commerce and interstate traffic

which the Commission ordered removed. Such discrimination existed not only against Nashville and manufacturers located at Nashville in favor of Birmingham and manufacturers located at the latter point, but also against various interstate points including Atlanta, Rome, Columbus and Richland, Georgia, Pensacola, Florida, Corinth and Meridian, Miss., and manufacturers located at such points.

The movement from interstate origins to Alabama destinations is by no means limited to short hauls from points in adjacent States near the Alabama State line. For example, Exhibit No. 288, submitted before the Commission, shows the total movement and the points of origin of all shipments of fertilizer to destinations in the State of Alabama located on the Alabama, Tennessee & Northern Railroad for the first four months of 1925. This exhibit is, in part, as follows:

Point of Origin		Number of Carloads
Mobile,	Ala.	42
Montgomery,	Ala.	36
East Point,	Ga.	23
Meridian,	Miss.	16
East Birmingham,	Ala.	7
Bessemer,	Ala.	6
Grasselli,	Ala.	5
Northport,	Ala.	1
Atlanta,	Ga.	1
Macon,	Ga.	1
New Orleans,	La.	1
	Total	139

It will be observed that out of the total of 139 carloads of fertilizer moving to destinations on the Alabama, Tennessee & Northern in Alabama during the period stated, 41 carloads originated at points in other States, such as East Point, Atlanta, and Macon, Georgia, and New Orleans, Louisiana. Atlanta, Macon and East Point are in the central portion of the State of Georgia, while the points on the Alabama, Tennessee & Northern are in the western portion of the State of Alabama.

Mr. C. W. Hayward, appearing on behalf of the Meridian, Miss., Traffic Bureau, testified in part as follows (R. 742):

> "We are in accordance with the principle of equalization, which we understand it is the purpose of the Commission to effect by this investigation. We have discriminations against Meridian not only in the intrastate rates in Alabama, but also in the interstate rates from manufacturing points in Mississippi and from points in Georgia."
>
> "* * * We have a large fertilizer factory in Meridian. They operate three factories, one in Meridian, one at Hattiesburg, and one at Shelbyville. And fertilizer is a commodity that is not necessarily limited to a restricted zone of distribution. The Meridian Fertilizer Factory can and does ship into Alabama, Georgia, Florida, and all over the Southeast, wherever they may place their product, and I do not know to what extent, whether they do to a very large extent, but it is not a commodity that is limited in its distribution.
>
> "As to the movement into Mississippi, I know that there has been a movement from Alabama—possibly Montgomery, Alabama, into plants surrounding Meridian, into our trade territory, and that has been possible largely because of these discriminations in favor of the Montgomery ship-

per, the Alabama shipper. I don't know that our factory ships into Georgia, now. I would not be in position to state definitely that they are covering those States to any extent, but I say it is possible to do it, just as it is possible for Atlanta or Montgomery or Birmingham or any fertilizer manufacturing point to ship into Mississippi, but we think that rates from Meridian into Alabama and Georgia should be on the same plane, same relative plane, as rates from fertilizer plants in Alabama and Georgia to Mississippi." (R. 742-744.)

Witness T. A. Bosley, testifying on behalf of the National Fertilizer Association (R. 684) said:

"The movement of fertilizer varies so—that is, I mean, it varies from different factories. One year, a good big tonnage may move from a certain point and the next year that tonnage may be decreased very much, and move from another point, and of course that would affect the revenue to a great extent." (R. 701.)

Witness J. H. Alldredge, who appeared in the hearings before the Commission as a witness for the *Alabama Public Service Commission*, testified:

"Now, as to grading the scale. *Fertilizer factories are scattered all over the Southeastern Territory, and are actively competing in common territory in the sale of fertilizer, and if a scale breaks too abruptly, the chances are that one or more of the several factories competing in the same territory will obtain the advantage of the breaking scale, and use it against its competitors.* The sale of fertilizer seems to have pretty keen competition, and the fertilizer factories are scattered around, so that in almost every spot in the South-

east there is competition between two or more factories." (R. 818, 819.) (Italics supplied)

And again, this witness testified as follows:

"Now, there is another very important element entering into this question of grading of fertilizer scale, and balancing it, *particularly as between the short hauls and the long hauls.* There are factories situated along the Gulf Coast and the South Atlantic and North Atlantic Coasts that have a natural advantage in assembling their raw materials over the interior factories. And *if a scale is graded in such a way that an artificial preference is given to the long-haul shipper over the short-haul shipper located back in the interior, he can combine that advantage with his natural advantage, and play havoc with the interior man.* I do not know of anything that is more important to be considered in the grading of the scale than that fact itself. We endeavored to avoid that. I do not say that the short-haul shipper should have any advantage over the long-haul shipper; I think that both should have justice, but it is quite important to see that the scale is not unbalanced as between the short hauls and the long hauls." (R. 819.) (Italics supplied)

Certainly this representative of the State of Alabama recognized that the movement of fertilizer and fertilizer materials was not confined to short hauls and the importance of having the rates so made as to bring about a fair and proper relationship as between the short-haul and the long-haul shipper. This is directly contrary to appellants' contention, as we understand it, that the movement of fertilizer into Alabama is for short hauls from border points in other States.

The foregoing references to the record should be

sufficient to dispose of such statements appearing in the brief for the appellants as that "the proof, if any, of a violation of Section 3 relates to certain border competition along the boundaries of the State of Alabama; there is no pleadings or evidence covering all the intrastate rates in Alabama on fertilizer" (appellant's brief, page 17); or the statement in the brief that "as to many shipments within Alabama no competition is shown or attempted to be shown, and none exists" (brief, page 31); or the further statement appearing in this brief that "the complaint and evidence here deals with only a few points" (brief, page 43). The undisputed testimony of witness after witness in the case is to the effect that fertilizers and fertilizer materials move throughout the State of Alabama in both intrastate and interstate commerce; that the interstate movement into that state is not confined to border points, but, on the contrary, there is a large movement from points outside of Alabama, both into and through that state, and for relatively long hauls (see also Appendix B hereto); and further, that in Alabama, as in other portions of Southern territory generally, fertilizer factories are located at numerous points, and the various manufacturers are active competitors among themselves for the sale and distribution of their products throughout the surrounding territory. These facts, moreover, appear not only from the testimony of both railroad and shipper witnesses, but also from the testimony of the rate witness for the Alabama Public Service Commission (R. 818, 819).

Upon the question of discrimination as between persons and localities under Section 3, counsel for appellants further contend that the Commission was without authority to enter the order complained of because,

it is said, certain of the intrastate rates in Alabama were higher than the interstate scale which the Commission prescribed. The statement is made in the brief (at page 42) that "about one-third" of the movement in Alabama is under rates that are in excess of the rates established by the Interstate Commerce Commission. We are unable to find in the record any basis for this computation. But if the jurisdiction of the Commission is questioned upon this ground, the obvious answer is that even if some rates in Alabama were higher than the scale which the Interstate Commission prescribed, *that situation did not exist during any part of the time in which the investigation was instituted, conducted, and concluded by the Commission and its report entered.* On the contrary, the record shows that when the proceeding was instituted the interstate rates between Alabama and other States were generally higher than the intrastate rates in Alabama for like distances. Witness Drescher testified that out of a total of 2,355 rates (shown by his Exhibit No. 166) the Alabama scale was less than the interstate rates in 2,145 instances, higher in 182 instances, and was the same in 28 instances. (R. 450). Morever, the Commission found and stated in its report:

> "Taking up first the Alabama situation, it is shown by numerous exhibits that the rates from points in Mississippi, Tennessee, and Georgia to destinations within Alabama are substantially higher than the Alabama rates for corresponding distances. A few illustrations will suffice to give a general idea of the present adjustment." (R. 91).

The Commission further stated:

> "One of the shippers' principal witnesses admitted that the rates which they propose (Ala-

bama scale) are, with the exception of rates within Mississippi and for short distances in Georgia, *lower than any existing fertilizer rates in southern territory that have been prescribed either by us or by State commissions.*" (R. 58).

It was this discriminatory situation—which the Commission found to exist at the time when its investigation was conducted—of which the correction constituted one of the very purposes of the investigation. It follows, therefore, that the mere fact that the mileage scale which the Commission prescribed for uniform application as the result of this investigation may, in some instances, be lower than the rates in effect at the time in Alabama, can not possibly serve to break down or destroy the jurisdiction or power of the Commission in the premises. What the Commission did was to prescribe a scale of which the announced purpose and intent was that it should be applied uniformly throughout the territory, thereby removing not ony the existing discriminations against persons and localities under Section 3, but removing also the discrimination against interstate commerce itself which the Commission found to exist under Section 13, in connection with the body of the Alabama rates as a whole.

Transportation conditions within Alabama are not dissimilar to those prevailing with respect to interstate transportation from points in adjacent States to destinations in Alabama. (R. 456-457, 495.)

In this connection the Commission, in its report, said:

"* * * the evidence indicates that the transportation conditions in Alabama are not dissimilar to those met with on the interstate hauls." (R. 93.)

Throughout the entire proceeding before the Commission, the fertilizer interests as well as certain State authorities, urged the importance of and necessity for a uniform level of rates on fertilizer and fertilizer materials throughout Southern territory.

Mr. A. D. Strobhar, testifying before the Commission as the representative of the President of the National Fertilizer Association (R. 648) stated, in part, as follows:

> "Q. May it fairly be said, Mr. Strobhar, so far as you know, it is the point of view of the executive committee of the Association that it is quite important, as soon as possible, to substitute a uniform mileage basis on fertilizer for the present, more or less jumbled hodge-podge of rates that exist?
>
> "A. They are important, very important." (R. 653.)

Mr. Wm. H. Fleming, appearing on behalf of the Southern States Phosphate & Fertilizer Company, said:

> "I am here representing the Southern States Phosphate & Fertilizer Company at Augusta, and their head office in Savannah, and we are here to ask removal of the discrimination against us in favor of shippers at Charleston and Columbia, South Carolina." (R. 605.)
>
> "* * * Under the Constitution of the United States and under the Interstate Commerce Law, this company is entitled to have the above mentioned discrimination against it removed.
>
> "The whole trend of Federal legislation and judicial construction has been in the direction of preventing discrimination by one State against another in general commerce." (R. 606.)

Mr. T. A. Bosley, Traffic Manager of the Virginia-Carolina Chemical Corporation, who appeared on behalf of this company and the National Fertilizer Association, testified, in part, as follows:

> "The movement of fertilizer varies so—that is, I mean it varies from different factories. One year a good big tonnage may move from a certain point, and the next year that tonnage may be decreased very much, and move from another point, and of course that would affect the revenue to a great extent." (R. 701.)
>
> "* * * We are proposing the same rates intrastate as interstate. I don't see how we can except any State from that, to be consistent.
>
> "I think rates should be the same in all states especially if the interstate rate is the same. We are not suggesting that there should be any different level of rates in different parts of southern territory." (R. 706.)

Commissioner Maxwell, of the North Carolina Corporation Commission, appeared on behalf of the authorities of the State of North Carolina and stated, in part:

> "It is our opinion that a lower level than the Royster Scale should be adopted for general application throughout the Southeast, and it is the purpose of the North Carolina Corporation Commission to revise the schedule of rates on fertilizer between points in North Carolina before the season for another general movement of fertilizer *and as soon as this may be done without creating discrimination against interstate shippers.*" (R. 604.) (Italics supplied.)

In summarizing the evidence with respect to the discrimination in favor of Alabama shippers and lo-

calities against interstate shippers and localities the Commission said, in its report, 113 I. C. C. at pages 431 and 432 (R. 91-93):

"Taking up, first, the Alabama situation, it is shown by numerous exhibits that the rates from points in Mississippi, Tennessee, and Georgia to destinations within Alabama are substantially higher than the Alabama rates for corresponding distances. A few illustrations will suffice to give a general idea of the present adjustment. In conjunction with the present rates are shown also the rates under the single-line Royster scale and under the scale herein found reasonable, for the distances shown:

From	To	Distance *Miles*	Present rates *Cents*	Royster scale *Cents*	Scale herein prescribed *Cents*
Tupelo, Miss.	Glen Allen, Ala	72	230	214	200
Birmingham, Ala.	do	75	170	214	200
Chattanooga, Tenn.	Larkinsville, Ala.	62	210	203	185
Decatur, Ala.	do	60	155	203	180
Nashville, Tenn.	Elkmont, Ala.	98	259	259	225
Birmingham, Ala.	do	107	205	259	235
Columbus, Ga.	Superior, Ala.	46	203	180	165
Montgomery, Ala.	do	49	145	180	165
Columbus, Ga.	Alexander City, Ala.	75	237	214	200
Birmingham, Ala.	do	82	180	237	210
Rome, Ga.	Anniston, Ala.	63	216	203	185
Birmingham, Ala.	do	63	160	203	185
Atlanta, Ga.	Heflin, Ala.	85	259	237	210
Birmingham, Ala.	do	82	180	237	210

In the foregoing table, destinations have been selected approximately equidistant from the respective origins, but for other distances the intrastate and interstate rates bear a similar relation. Manufacturing plants are located at all the originating points shown, and the evidence indicates that the transportation conditions in Alabama are not dissimilar to those met with on the interstate hauls.

The Alabama commission contends that the law does not require that intrastate rates shall be maintained on the exact level of interstate rates, citing *Ohio State Rates on Sand, Gravel, Stone, and Paving Blocks*, 85 I. C. C. 66, and that before an intrastate rate may be condemned it must be found to work an undue prejudice against persons or localities in interstate or foreign commerce or unjust discrimination against interstate or foreign commerce as a whole, citing *Wisconsin R. R. Commission, v. C., B. & Q. R. R. Co.*, 257 U. S. 563. It urges that the carriers have not proved their case, and points to the fact that the carload minimum in connection with the Alabama rates is 5 tons higher than under the interstate rates, and that its scale averages as high as the so-called normal scales of three of the largest trunk lines operating in that State, namely, the Illinois Central, the Louisville & Nashville, and the Mobile & Ohio. This latter statement is true so far as the average is concerned, but specific consideration of the present interstate rates is unnecessary, for they will be changed under our findings herein. As shown by the above table, the new rates will be substantially higher for equal distances than the Alabama intrastate rates, and they will be subject to the same carload minimum.

While exact harmony between intrastate and interstate rates may not in all cases be required by the law, nevertheless when there is such a preponderance of intrastate traffic as here obtains, the conclusion is inevitable that the application of rates thereon substantially lower than the interstate rates contemporaneoulsy applied under similar conditions must bring about, in some degree at least, the unjust discrimination against interstate commerce as well as the undue prejudice to persons or localities in interstate commerce which are declared by the act to be unlawful."

And again, at page 435 of its report (R. 101) the Commission said:

> "That the maintenance of intrastate rates in Alabama on a lower basis than the corresponding rates herein found reasonable for the interstate transportation of fertilizers and fertilizer materials will for the future result in unjust discrimination against interstate commerce and in undue prejudice to persons and localities in interstate commerce."

The most cursory examination of the voluminous record before the Commission in these consolidated proceedings will serve to convince that there was ample evidence to justify the findings made that the interstate and intrastate rates throughout southern territory should be on a uniform basis, and that the Alabama intrastate rates were discriminatory against persons and localities in other states and also against interstate commerce. All parties in interest who appeared and testified conceded that state and interstate rates should be on a common level and certainly the Alabama Commission did not controvert the proposition that one uniform level should prevail. The single exception to this concensus of opinion was the view expressed by the Florida East Coast, which desired a somewhat higher level to and from points in the Florida peninsula than the Commission prescribed for Southern territory as a whole. The Commission comments upon this practical unanimity of view in regard to a common rate level at several points in its report, and it finds as a fact that the record supports one uniform rate level. (113 I. C. C. 422.) On this point it said:

> "Considering all the circumstances surrounding this particular form of traffic and the general agreement upon this point, resulting in a paucity of evidence to the contrary, we think that the record supports one uniform level."

Reference has repeatedly been made to the fact that the Alabama intrastate rates, if applied throughout the territory, would have reduced the carriers' revenues at least $1,250,000 annually. (R. 71.) Reference has likewise been made to the fact that substantially seventy per cent of the tonnage, and sixty per cent of the revenue derived from the transportation of fertilizers and fertilizer materials between points in southern territory is represented by traffic moving on intrastate rates. (70-71.) Obviously if the state commissions were left free to make the intrastate rates in their respective states substantially lower than the interstate level which the Commission had prescribed on the assumption that the intrastate rates would be brought into conformity therewith and kept upon that level, then the revenues of the carriers from this traffic would be seriously depleted and they would be required to handle traffic at less than reasonable rates, or the loss would have to be made up by increasing the interstate rates on fertilizer and fertilizer materials, as well as on other commodities, since so large a preponderance of the tonnage of this traffic is intrastate.

We have, then, the facts that the Commission has fixed the interstate level; that it has found there is no justification for any lower rates intrastate in Alabama; that one scale should prevail, and one uniform level be observed, throughout southern territory; that

it prescribed a scale and a rate level to be applied uniformly, on the assumption that the intrastate rates would be brought to that level, and expressed the expectation that the State commissions would bring their rates into harmony with the interstate level so prescribed; that it has found that the Alabama intrastate rates, if continued on the present level (which is substantially lower than the interstate level) would violate the positive provisions of the Interstate Commerce Act and would create the undue prejudice and unjust discrimination, not only against persons and localities served in interstate commerce, *but the unjust discrimination against interstate commerce forbidden and declared to be unlawful by paragraph 4 of Section 13 of the Interstate Commerce Act, as amended.*

5.

The Commission's Findings of Undue Discrimination, Being Grounded Upon Substantial Evidence, Are Conclusive and Will Not be Reviewed by the Courts.

The repeated decisions of this Court, to which reference will presently be made, declare the law to be that the finding of the Commission on the question of discrimination is conclusive if there is any evidence to support such finding, and that the Court will not undertake to weigh the evidence or to measure the degree of discrimination; and further, that for the Court to consider the weight of the evidence or to pass upon the wisdom of the order entered, is beyond its province.

The Commission says that to continue the Alabama intrastate rates will create the undue prejudice and

unjust discrimination forbidden by law. The Alabama Commission says that it will not do so. It is submitted that the views of the Interstate Commerce Commission must prevail, as it is dominant in the field of regulation when the Federal power is called in question and the exercise of that power is necessary to preserve and protect the revenues of the carriers, the interstate rate level, interstate commerce, and persons and localities served therein.

The Interstate Commission, after having made its findings in regard to the Alabama intrastate rates, and having likewise found that they should be placed upon the level which it prescribed as reasonable for interstate rates, as stated, in a spirit of comity and in an effort to cooperate with the Alabama Commission, afforded that tribunal an opportunity to bring the intrastate rates into line with the interstate rates and thus cooperate with the Interstate Commission. (R. 102.) That the Alabama Commission has declined to do. (R. 10.) It still adheres to and persists in the view that it is for it to determine whether there is unjust discrimination against interstate commerce or an undue burden upon interstate commerce or unjust discrimination or undue prejudice to persons and localities served in interstate commerce by reason of the maintenance of intrastate rates in Alabama which are substantially lower than the interstate rates promulgated by the Interstate Commission, prescribed and fixed by it as a standard not only for interstate rates, but for intrastate rates in the three southern states where the intrastate rates were directly in issue before it, including the State of Alabama.

That the judgment of the Interstate Commission must prevail does not admit of doubt. As was said

by this Court in the *Minnesota Rate Cases*, 230 U. S. 352, 57 L. ed. 1511-1555, quoted with approval in the *Wisconsin case, supra:*

> "The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the comingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the state, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere."

Commenting on this immediately after having made the foregoing quotation from the *Minnesota Rate Cases*, this Court said in the *Wisconsin case*, 66 L. ed. at page 384:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with

> intrastate rates as between themselves *on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.*" (Italics supplied.)

The Court then referred to what might be accomplished through cooperation, and said:

> "So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates."

The question is not merely one of interstate rates versus intrastate rates, where the interstate rates have not been passed upon by the Commission. We have seen that in its comprehensive investigation the Commission, in the discharge of the duties confided to it by law, fixed the general rate level and the scale to be used in attaining and preserving that level, having in view not only the interstate rates, as such, but the intrastate rates which all parties admitted should be harmonized therewith. As the result of a most thorough, painstaking, and exhaustive investigation, it prescribed this rate level to be observed throughout the territory. Under appropriate issues made concerning the Alabama intrastate rates it has found and held, after a most thorough and exhaustive investigation and after hearing all parties, that the maintenance of rates in Alabama, on a level which it finds to be materially lower than the level which it has prescribed for general application throughout the South, includ-

ing the state of Alabama, will unjustly discriminate against and unduly burden interstate commerce and will constitute an unjust discrimination and undue prejudice against persons and localities served in interstate commerce; and that this unjust discrimination and undue prejudice must be removed, and it orders that it shall be removed by placing the Alabama intrastate rates upon the same level and basis as that which it has prescribed for general application throughout the whole of Southern territory. That its findings and conclusions in regard to unjust discrimination and undue prejudice found to exist are conclusive, and that the Court may not weigh the evidence or the wisdom of the order entered by the Commission, is settled by a long line of decisions of this Court, some of which are as follows:

Virginian Ry. vs. United States, 47 Sup. Ct. Rep. 222, 270 U. S. 658, ul L. ed.

Western Paper Makers' Chemical Co. vs. United States, 271 U. S. 268.

United States vs. Illinois Cent. R. R., 263 U. S. 515, at pp. 521-526.

Interstate Commerce Commission vs. Illinois Central R. R. Co., 215 U. S. 452, 470.

Interstate Commerce Commission vs. D., L. & W. R. R. Co., 220 U. S. 235, 251.

United States v. Louisville & Nashville R. R. Co., 235 U. S. 314, 320.

Manufacturers Ry. Co. v. U. S., 246 U. S. 457, 481-2.

Seaboard Air Line Ry. Co. vs. U. S., 254 U. S. 57, 62.

See also:

U. S. v. Pennsylvania R. R., 266 U. S. 191, 199.

In *Virginian Ry. Co. v. United States, et al., supra,* concerning the Commission's finding of unjust discrimination, it was said, 272 U. S., at page 663:

> "The Virginian attacks the Commission's finding of unjust discrimination. There clearly was substantial evidence to support every fact specifically found. To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province. Whether a rate is unjustly discriminatory is a question on which the finding of the Commission, supported by substantial evidence, is conclusive, unless there was some irregularity in the proceeding or some error in the application of rules of law. *Western Paper Makers' Chemical Co. v. United States,* 271 U. S. 268."

In *Interstate Commerce Comm. v. Ill. Cent. R. R.* 215 U. S. 452, the distinction between the power to make the order and the authority for the Court to review the question of power, as distinguished from the expediency or wisdom of making the order, and the lack of power in the Court to review or weigh the sufficiency of the evidence on which the order is based, is thus stated by the Court, at page 470:

> "The statute endowing the commission with large administrative functions, and generally giving effect to its orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction, it becomes necessary to determine the extent of the powers which courts may exert on the subject.
>
> "Beyond controversy, in determining whether an order of the commission shall be suspended or

set aside, we must consider, *a*, all relevant questions of constitutional power or right, *b*, all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and, *c*, a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. *Postal Telegraph Cable Company v. Adams*, 155 U. S. 688, 698. Plain as it is that the powers just stated are the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, *it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.*

"Power is to make the order and not the mere expediency or wisdom of having made it, is the question." (Italics supplied.)

Likewise, in *Manufacturers Railway Co. v. U. S. et al.*, 246 U. S. 457, it is emphasized that the Court cannot substitute its judgment for that of the Commission upon the sufficiency of the evidence, or upon matters purely administrative, confided to the judgment of the Commission by Congress, and in so holding the Court said, at page 482:

"The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. *United States, v. Louisville & Nashville R. R. Co.*, 235 U. S., 314, 320; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361."

In *United States v. Louisville & Nashville R. R. et al.* 235 U. S. 314, 59 L. ed. 245, this Court reversed the decision of the Commerce Court, wherein the last named court, having found that there was no conflicting evidence or dispute concerning the origin and character of the reshipping privilege at Nashville, concluded that whether such privilege was an undue preference was not a matter of fact, but a question of law upon which it was the duty of the Commerce Court to reach an independent conclusion. The Commerce Court, therefore, among other considerations, because the rebilling privilege was of long standing and was justified by water competition at Nashville, declared it to be not unlawful and not preferential. This Court reversed the decision of the Commerce Court, upheld the order of the Commission, and in doing so said, at page 320:

"In view of the doctrine announced in Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Delaware, L. & W. R. Co., 220 U. S. 235; Interstate Commerce

Commission v. Louisville & Nashville R. R., 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission, on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. East. Tenn. etc. Ry. Co. v. Interstate Commerce Commission, 181 U. S. 1, 23, 29. And the amendments by which it came to pass that the findings of the Commission were made not merely *prima facie* but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It can not be otherwise since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action."

In the decision in the *New England Divisions Case.* (*Akron, C. & Y., et al. v. U. S.*) the Court said, 67 L. ed., at page 615:

> "To consider the weight of the evidence, or the wisdom of the order entered, is beyond our province."

In *Seaboard Air Line Ry. v. U. S.*, 254 U. S. 57, the rule is thus stated, at page 62:

> "Moreover the determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

In *Louisville & Nashville R. R. Co. v. U. S.*, 245 U. S., 463, it was held:

(1) That the Commission's findings of fact, based on evidence before that tribunal, are conclusive; and

(2) That on the issues presented the validity of the order depended on the evidence before the Commission, and the trial court in the suit attacking the order did not err in excluding other evidence.

The Court said, at page 466:

> "The case comes here by direct appeal; and thirty-eight errors are assigned. Eleven relate to the weight or sufficiency of the evidence before the Commission. The evidence was conflicting. And, as there was ample to sustain the findings, they are conclusive. United States v. Louisville & Nashville R. Co., 235 U. S. 314, 320. * * * Other errors assigned relate to the exclusion by the court of evidence which was clearly inadmissible, both because of the character of the evidence and because, on the issues presented, the validity of the order must be determined upon the evidence introduced before the Commission."

See also *Procter & Gamble Co. v. U. S.*, 225 U. S. 282, wherein this Court had occasion to consider the

Act creating the Commerce Court, and held that the latter Act did not confer upon that tribunal jurisdiction to interpret originally the administrative features of the Interstate Commerce Act, and further, that the Commerce Court could not construe a refusal of the Commission to grant relief as an affirmative order which, it was contended, the Commerce Court could in turn construe with a view of granting relief which the Commission had denied. This Court, in holding that the Commerce Court had no such power, said, at page 297:

> "Originally the duty of the courts to determine whether an order of the Commission should or should not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the Commerce Court that in considering the subject of order of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred although it may not be technically doing so. Interstate Commerce Commission v. Union Pacific R. R. 222 U. S., 541, 547; Interstate Commerce Commission v. Illinois Cent. R. R., 215 U. S. 452,"

and in overruling the decision of the Commerce Court and holding that the provisions of the Act creating that Court did not confer the jurisdiction which it had sought to exercise in that case, it was further said, at page 298:

"In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the Commerce Court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite action of the Commission, operate to create a vast body of rights which had no existence at the time the Commerce Court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would of necessity amount to a substitution of the court for the Commission or at all events would be to create a divided authority on a matter where from the beginning primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against, an interpretation which would seemingly create rights hitherto non-existent, and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the act would necessarily amount to declaring that Congress in seeking to unify and

> perfect the administrative machinery of the act to regulate commerce and to make more beneficial its operation had overthrown the whole fabric of the system as previously existing."

The *Louisville & Nashville Case, supra,* expressly holds that new evidence cannot be introduced before the Court to attack an order of the Commission, and that the lower Court properly excluded evidence which was offered in an effort to set up facts which the defendant contended would militate against the propriety or wisdom of the order, but which evidence was not before the Commission in the proceeding in which the order was made, one of the reasons given by the Court for the exclusion being that—

> "The validity of the order must be determined upon the evidence introduced before the Commission."

The decision in the *Procter & Gamble Case, supra,* also tends strongly to this view, while in the recent case of *C. R. I. & P. Ry. Co. v. U. S.*, 47 Sup. Ct. 486, it was held that where the determination of the Interstate Commerce Commission finds substantial support in the evidence, it is not within the province of the Court to weigh the evidence, or to consider the wisdom of the Commission's action.

6.

Appellants Were Accorded a Full and Complete Hearing in the Proceedings Before the Commission.

Among the assignments of error by appellants is the following:

"5. In not enjoining the orders of the Interstate Commerce Commission sought to be enjoined herein for the reason that such orders condemned intrastate rates in Alabama in comparison with rates fixed by the Interstate Commerce Commission in a report dated July 19, 1926, when as to such rates so fixed there had never been any hearing concerning their relationship to the rates intrastate in Alabama."

Little need be said, we think, concerning this contention of appellants. While the order of the Interstate Commission is directed at the disparity between the interstate rates which it prescribed and the Alabama intrastate rates, the appellants contend that they have not had a hearing concerning the unjust discrimination and undue prejudice found, based upon the difference in the rate levels growing out of the interstate basis prescribed, on the one hand, and the intrastate rates in effect in Alabama on the other.

Paragraph 4 of Section 13 requires the Interstate Commerce Commission not only to remove the unjust discrimination found to exist, but to prescribe the rates to be observed for the future and which will remove the undue discrimination. The Interstate Commission, under the mandate of this section, must do two things: determine whether there is unjust discrimination, and direct how it shall be removed by prescribing the rate level to prevail for the future. It will scarcely be contended that the Alabama Commission, or any other party in interest, has not been heard concering the rate level to prevail for the future. That was most thoroughly investigated and finally determined in the *General Investigation of Fertilizer Rates*, Docket 16295, and the consolidated cases heard therewith, including Docket No. 16336. But, say appellants, we have not

been heard in regard to this rate level as contrasted with the intrastate rates in Alabama, nor have we been heard on the question as to whether the lower Alabama intrastate rates will unduly discriminate against the interstate rate level now in effect and promulgated by the Interstate Commerce Commission.

The Alabama Commission has been heard on both issues. It knew that in Docket 16336 the Alabama intrastate rates, which were lower than the interstate rates applicable into and out of Alabama, were under investigation and that the specific investigation ordered in said Docket 16336 was to determine—

> "(1) Whether the rates on fertilizers and fertilizer materials required by the Alabama Public Service Commission to be maintained by said railroad, cause or will cause any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, and,
>
> "(2) As to what rates, if any, or what maximum or minimum or maximum and minimum shall be prescribed to be charged by the petitioners in order to remove such advantage, preference, prejudice or discrimination if any may be found to exist." (R. 207-208)

It will be seen, therefore, that the inquiry was not only as to the discrimination, but as to how it should be removed and what rates should prevail for the future in order to remove such discrimination as might be found to exist. That investigation was consolidated and heard with the investigation of wider scope which was to determine the rate level which should prevail

in Southern territory, including the State of Alabama, and as to whether there should be different rate levels in different sections of Southern territory or only one common rate level.

The Alabama Commission was heard at length, as were other state commissions, through their representatives, as well as manufacturers and shippers and the carriers.

The Interstate Commission determined, upon an ample record, that there should be one uniform rate level throughout the territory, and that there were no differentiating circumstances or conditions within the State of Alabama which would justify or require any lower rate level within that state than that prescribed for interstate application from, to, and between points in Alabama and in other sections of Southern territory.

The Interstate Commission did not adopt the scale which was advocated by the Alabama Commission and by the manufacturers and shippers, nor did it adopt the higher scale which was advocated by the carriers. It is not understood that anyone seriously contends that the Interstate Commission in such an investigation was compelled to adopt either the one or the other. It was its duty, on the evidence, to fix what it considered to be the proper rate level to control for the future, and it did prescribe a general basis of rates on this traffic for application in Southern territory which was made reasonably and relatively low, according to its own statement, because of the characteristics of this traffic and other considerations mentioned in its report. It said that the same scale must be applied into, out of, and between points in Alabama, and there was no evidence which would justify any lower scale in Alabama than that which it had ordered for general application

in Southern territory. As it had already inaugurated an investigation specifically to determine whether there was discrimination brought about by lower intrastate rates in Alabama than those which applied, or would be concurrently applied, for interstate application, and had likewise directed a specific inquiry and made careful investigation to determine what rates should be charged in order to remove any unjust discrimination or undue preference found to exist, and all parties having been fully heard on said issues, it is certainly a most strained and unnatural contention that appellants now advance, namely, that a second investigation covering the same field should be made.

Notwithstanding the scope of the inquiries already made and the comprehensive investigation conducted and the painstaking analysis of all of the evidence and proposals advanced respectively by the many parties in interest, including appellants here, it is nevertheless contended by them that the Commission should go through the form of holding another hearing and undertake the useless procedure of again inquiring whether the lower Alabama intrastate rates constitute the unjust discrimination and the undue prejudice forbidden by the Act, and whether the scale of rates which the Commission has already promulgated and which has been published in obedience to its orders for application interstate throughout Southern territory and in practically all of the southern states for intrastate application, should be applied in the future for application between points in Alabama. The contention made by appellants is tantamount to saying that after the Commission made the investigation which it ordered in Docket 16336 upon both branches of the inquiry therein di-

rected to be made and after it determined that there was undue prejudice, and unjust discrimination flowing from the lower intrastate rate level in Alabama, and after it prescribed the rates to be observed for the future, it must nevertheless hold a second hearing and make the same investigation covering the same two points of inquiry before it could promulgate an order carrying into effect its findings. Such a proposition falls with the mere statement thereof.

It should be added that before the Commission promulgated its final report there was issued and served upon the parties a tentative or proposed report prepared by the Examiner of the Commission who sat throughout the hearing with the presiding Commissioner. The findings and conclusions in that report as to the lower Alabama intrastate rates, as to the fact that those rates are unduly low, and as to the undue prejudice and unjust discrimination resulting therefrom, are practically the same as those which are incorporated and made in the final report. The Alabama Commission was served with a copy of this tentative report. It filed exceptions thereto and a brief in support of its exceptions. It was heard in argument thereon and its exceptions were overruled and the final report issued, which promulgated a scale of rates on fertilizers differing somewhat in detail from that proposed by the Examiner of the Commission in his tentative report, but which the Commission said would produce substantially the same revenue level as that proposed by the Examiner (R. 37-1022).

This procedure, coupled with what had gone before, certainly accorded to the parties in interest every opportunity to be heard on any and every possible

objection that they, or any of them, might have to the proposed report, and likewise afforded to them an opportunity to argue and present their objections to the Commission for its consideration before final action thereon. Only after all of this had transpired did the Interstate Commission promulgate its final report and order.

7.

The Evidence of Record Supports the Commission's Action in Making Its Order Applicable to Short Line Railroads.

Appellants insist that the lower Court erred:

> "13. In not enjoining the orders of the Interstate Commerce Commission sought to be enjoined herein because such orders are made applicable to short line railroads when as to such railroads there was no evidence whatsoever as to the specific earnings of each road nor as to the relationship of the transportation over such railroads to transportation over interstate roads." (R. 243-244.)

The testimony submitted before the Commission was comprehensive in its scope and presented a complete picture of the situation as to the rates not only of the so-called trunk lines, but also of the so-called short lines.

John A. Streyer, Traffic Manager of the American Short Line Railway Association, appeared at the hearing and testified at length on behalf of the short line railroads in the South. (R. 582-598.) While he did not deal specifically with each and every short line, he did deal with the rates and earnings of numerous representative short lines and, generally, with the rate

structure and financial condition of all short lines in Southern territory.

Witness Gill testified on behalf of certain short lines, as follows:

> "The State Commissions of Alabama, Mississippi and Tennessee, have also in the past and do now recognize these lines as requiring special treatment and they have been, are permitted, and do now maintain higher intrastate rates than applicable over trunk lines. This is mentioned merely to illustrate that these lines, account of location, financial and physical conditions, traffic density, and nature of traffic, cannot afford to operate rates in effect on stronger trunk lines." (R. 556.)

One of the principal witnesses for the fertilzer interests, as well as counsel for the fertilizer industry, stated that they favored generous treatment for the short line carriers. (R. 758-759.)

In its report the Commission, in dealing with the proposal of the short lines, said:

> "The American Short Line Railroad Association, on behalf of its southeastern members, seeks a special basis of rates for these short lines because of their poor financial condition and limited traffic resources. The general basis of interstate rates on fertilizer to points on these lines is now the full combination over the trunk-line junction point. Intrastate rates are made, as a rule, on the combination basis less certain percentages, which vary in the different States. In Georgia the full combination contains. In Alabama, on the other hand, joint rates between trunk-line and short-line points are made 10 per cent higher than the joint trunk-line scale. The local short-line

rates in that State are 20 per cent higher than the rates of the standard lines, and for joint short-line hauls the same differentials are added as obtain between the single and joint standard-line rates. This Alabama adjustment is the one which the shippers propose for general application." (R. 65)

"Any detailed discussion of the situation with respect to the Association lines seems unnecessary. It has received consideration in other cases, including *Southern Class Rate Investigation, supra*, where, except in a few instances, the necessities of these short lines were recognized. They have been accorded special treatment by most of the States and, in general, the shippers seem to favor such treatment. In 1924, according to an exhibit filed by their representative, many of these carriers had a deficit in net railway operating income and comparatively few had good earnings." (R. 67.)

The assignment of error by appellants here immediately under discussion is likewise without merit. The findings of the Commission as to the short lines were fully justified by the evidence of record.

8.

There was Ample Evidence Before the Commission to Justify It in Prescribing the Single-Line Scale of Rates for Both Single-Line and Joint-Line Hauls.

Appellants insist that the lower Court erred:

"7. In not enjoining the orders of the Interstate Commerce Commission sought to be enjoined herein, which orders prescribed one class of rates applicable both to single line and joint line hauls for the reason that the issues and testimony presented to that Commission in the cause in which such orders were entered related solely to the es-

> tablishment of two classes of rates, one applicable to a single carrier and one applicable to two or more carriers joining in the same haul, such orders of the Commission being without evidence to support them and being entered in violation of the fifth amendment to the Constitution of the United States and the laws of the United States which give petitioners a full hearing and due process of law." (R., 242-243.)

Prior to the beginning of the hearings in the proceeding before the Commission, Commissioner Eastman, in charge of the case, served a notice on all interested parties outlining in a general way what the Commission expected to develop. Among other questions which this notice stated that the Commission desired to develop was:

> "What, if any, should be the difference between single-line and joint-line rates?" (R., 218.)

An examination of the record in the proceeding before the Commission will disclose that the entire field was surveyed. Evidence was submitted with respect to all rates on fertilizer and fertilizer materials, interstate and intrastate, throughout Southern territory. The Commission had information concerning the movement both single-line and joint-line. To say that the Commission, in the proceeding before it, was not authorized, on a voluminous and complete record, to prescribe a single-line scale for both joint line and single line application is tantamount to saying that the Commission, in no case, would be authorized to prescribe a single-line scale for both single line and joint line application. In its report the Commission clearly sets forth the reasons which prompted it to prescribe such a scale. In this connection it said (R. 80-81):

"Carriers and shippers both acquiesced in the idea that the rates should be somewhat higher for joint-line than for single-line hauls. The carriers would maintain such a difference for all hauls, while the shippers would have it disappear at 500 miles. In the *Southern Class Rate Investigation, supra*, we prescribed the same class rates for both classes of hauls, making the scale for this reason somewhat higher than it would have been if prescribed for single-line hauls only. In general the parties are in accord that whatever rule for computing distances is applied in connection with class rates shall be employed also for determining the rates here in issue. In our second supplemental report in the *Southern Class Rate Investigation*, 113 I. C. C. 200, decided July 19, 1926, we found that in computing distances the shortest routes should be used over which carload freight can be moved without transfer of lading, making the scale somewhat higher than if the "shortest workable" routes had been used as the measure. Carriers and most shippers agree that some definite rule for the computation of distances which may be applied without the exercise of judgment is desirable, inasmuch as it lessens the time and expense of preparing rates for publication and avoids controversies as to the proper rate-making distances. Unquestionably, also, there are many practical advantages in adopting a uniform rule for computing distances. When one basis is adopted and consistently adhered to, distances once computed may be applied for the ascertainment of rates on any commodity or class, where distance scales are employed.

In a general way the same principle applies to the question of whether rates for joint-line service should be made higher than those for single-line service. If on one commodity arbitraries for joint-line service be employed, while on another commodity one scale is used for both single-line and joint-line service, the distance which deter-

mines the rate between particular points will often be different in one case from that in the other. There will also be like variations as between different commodities on which joint-line arbitraries are applied, depending upon the volume of the arbitrary as compared with the volume of the single-line rate to which it is added.

Manifestly where no additions are allowed for joint-line service and where short-line distances are used as the measure the single scale should be correspondingly increased. As above noted, of the total fertilizer traffic covered by the traffic test, single-line rates were applied to 67 per cent. Joint-line arbitraries were therefore applied to only about one-third. It is also true that where joint-line arbitraries are used the carriers in many instances do not secure the full amount of the arbitrary nominally applicable for any given distance, for often slightly longer single-line routes will determine the applicable rates. Under the circumstances the elimination of joint-line arbitraries will require a comparatively small increase in the single-line scale."

Clearly the assignment of error by appellants immediately under discussion is not meritorious.

CONCLUSION.

We have not undertaken to discuss specifically each assignment of error made by appellants, but we believe that such assignments are covered by our general discussion of the case. An examination of the assignments, in the light of the record, discloses that none is meritorious and, therefore, that the decision of the lower Court dismissing the bill should be affirmed.

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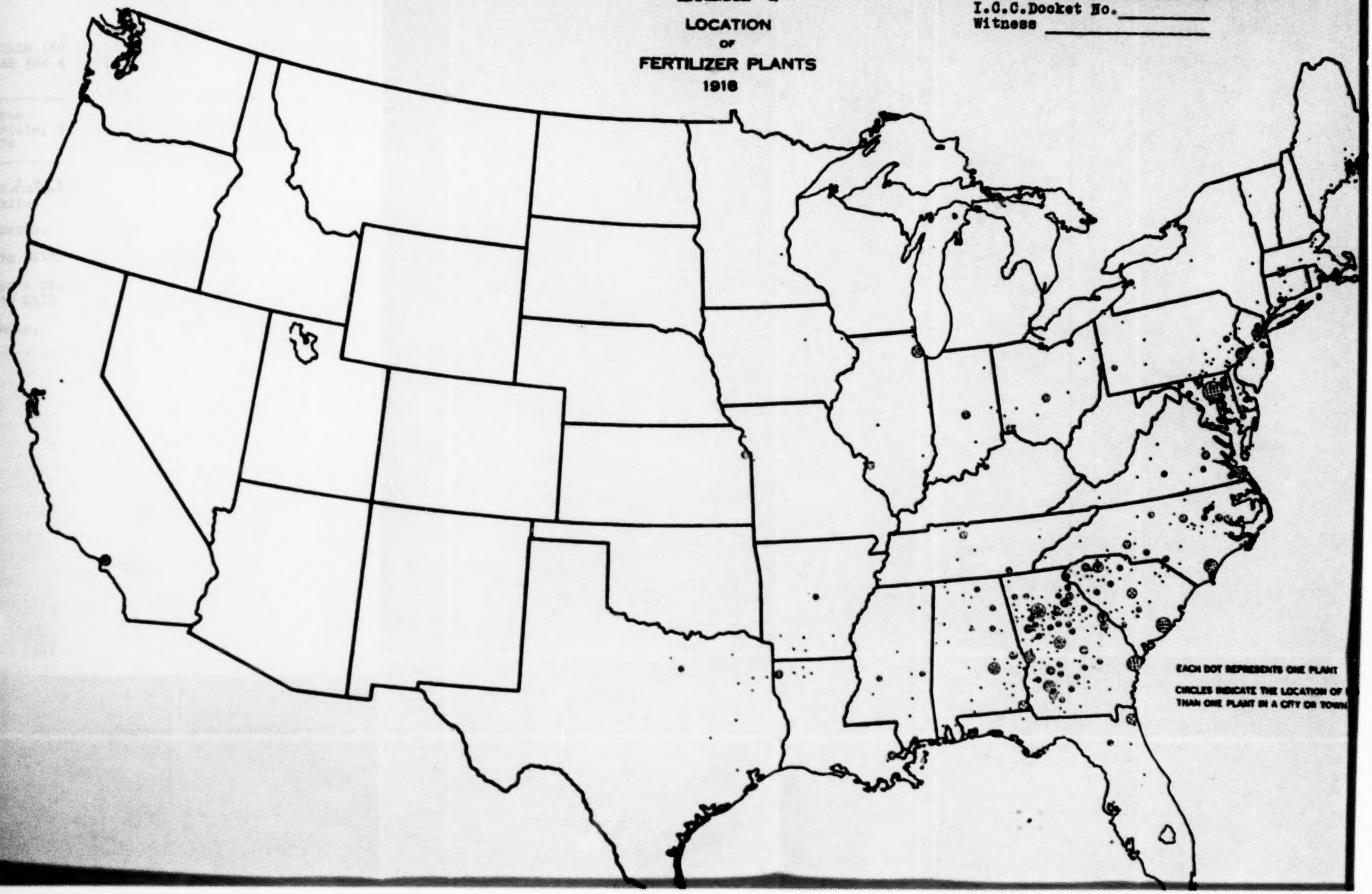
Charles Clark,
W. N. McGehee,
Counsel for Alabama Carriers, Appellees.

January, 1929.

APPENDIX "A"

LOCATION OF FERTILIZER PLANTS 1918

Defendant's Exhibit No. 46
I.C.C.Docket No._____
Witness _____



APPENDIX "B"

General Investigation Rates on
Fertilizer and Fertilizer Materials
between Southern Points.
I.C.C. Docket No. 16295.

Respondent's Exhibit No. 291.

STATEMENT OF THE PRESENT RATES AND THE RATES ON BASIS OF THE THIRD ROYSTER SCALE (50 I.C.C. 34) FROM BIRMINGHAM, ALA. AND NASHVILLE, TENN. TO AGENCY STATIONS ON THE LOUISVILLE & NASHVILLE R.R. BETWEEN BIRMINGHAM AND NASHVILLE.

From Birmingham, Alabama To		Distance	Present Rate	Third Royster Scale	Movement March and April, 1925. Cars	Tons	From Nashville, Tennessee To		Distance	Present Rate	Third Royster Scale	Movement March and April, 1925 Cars	Tons
L.&N. R.R. Stations							L.&N. R.R. Stations						
Boyles,	Ala.	3	80	90			Franklin,	Tenn.	18	147	135		
Monmouth,	"	18	110	135									
Trafford,	"	24	120	147			Thompsons,	"	28	147	158		
Hayden,	"	29	125	158	2	44.7	Spring Hill,	"	31	147	158		
Blount Springs,	"	33	130	158	2	64.8	Carter's Creek,	"	36	169	169		
							Dark's Mill	"	38	169	169		
Garden City,	"	39	135	169	9	209.5							
Hanceville,	"	45	140	180	15	459.2	Columbia,	"	45	203	180		
Cullman,	"	53	150	192	56	1628.3	Pleasant Grove,	"	55	203	192		
							Lynnville,	"	63	203	203		
Lacon,	"	64	160	203									
Falkville,	"	67	165	214	4	77.8	Buffords,	"	67	225	214		
							Riversburg,	"	71	225	214		
Hartselle,	"	72	170	214	3	90.1							
							Wales,	"	74	225	214		
Decatur,	"	85	180	237	16	495.2	Pulaski,	"	79	225	225	7	181.2
							Aspen Hill,	"	85	259	237		
Tanner,	"	93	190	248			Prospect,	"	90	259	237		
Athens,	"	98	195	259	3	70.7							
Elkmont,	"	107	205	259	1	40.3	Elkmont,	Ala.	98	259	259	8	256
							Athens,	"	107	259	259	59	1800
Prospect,	Tenn.	115	259	270			Tanner,	"	112	259	270	3	59
Aspen Hill,	"	120	259	270									
Pulaski,	"	126	259	270			Decatur,	"	120	225	270	8	238.2
Wales,	"	131	259	282									
							Hartselle,	"	133	259	282	45	1053
Riversburg,	"	134	259	282									
Buffords,	"	138	259	282			Falkville	"	138	259	282	5	111.0
							Lacon,	"	141	259	293	3	68.0
Lynnville,	"	142	259	293									
Pleasant Grove,	"	150	259	293			Cullman,	"	152	259	315	40	1159
Columbia,	"	160	259	315			Hanceville,	"	162	259	315	3	60
							Garden City,	"	166	259	315		
Dark's Mill,	"	167	259	315									
Carter's Creek,	"	169	259	315			Blount Springs,	"	172	259	327		
Spring Hill,	"	174	259	327			Hayden,	"	176	259	327		
Thompsons,	"	177	259	327			Trafford,	"	181	282	327		
							Monmouth,	"	187	282	327		
Franklin,	"	187	282	327			Boyles,	"	202	237	349	22	843.0
Nashville,	"	205	293	349			Birmingham,	"	205	237	349	1	40.0